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No. 80-2178

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN S. TOLL, PRESIDENT,
UNIVERSITY OF MARYLAND,
AND
UNIVERSITY OF MARYLAND,
Petitioners,

v.

JUAN CARLOS MORENO, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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Petition for Certiorari Filed June 24, 1981
Certiorari Granted October 5, 1981

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RELEVANT DOCKET ENTRIES

5/27/75—(1) Complaint.

6/25/75—(3) Answer.

10/6/75—(9) Motion of Plaintiffs for Summary Judgment.

11/4/75—(11) Motion of Defendants for Summary Judgment.

11/18/75—(14) Motion of Plaintiffs for Class Action Determination.

4/9/76—Hearing on all Motions before Miller J.

4/9/76—Argued and held sub curia.

7/13/76—(19) Opinion of Court and Order.

7/31/76—(20) Defendant's Motion for Stay of Order.

7/31/76—(20a) Notice of Appeal to the U.S. Court of Appeals for the Fourth Circuit.

8/2/76—Hearing on Motion for Stay.

8/3/76—(21) Order Granting Stay.

4/4/77—Argued and held sub curia in Court of Appeals.

4/28/77—Per Curiam Opinion of 4th Circuit affirming District Court decision.

5/11/77—Appellant's Petition for rehearing and suggestion for rehearing en banc.

5/23/77—Petition for rehearing denied.

5/26/77—Appellant's Motion to Stay Mandate.

5/26/77—Mandate Stayed pending application to U.S. Supreme Court for a writ of certiorari.

7/28/77—Petition for a Writ of Certiorari.

10/11/77—Certiorari granted.

2/22/77—Argued and held sub curia in U.S. Supreme Court.

4/19/77—Opinion of Court certifying question to the Court of Appeals of Maryland.

4/25/78—Certification Order.

2/21/79—Opinion of Court of Appeals of Maryland answering certified question.

4/30/79—Opinion of U.S. Supreme Court vacating judgment of 4th Circuit and remanding case to District Court.

10/31/79—(28) Opinion of the District Court on Due Process question.

11/16/79—(29) Motion of Plaintiffs for leave to file Supplemental Complaint and to Add a Party Plaintiff.

12/17/79—(35) Motion of Plaintiffs for Summary Judgment.

1/28/80—(36) Motion of Defendant for Summary Judgment and Affidavit.

2/4/80—(37) Order of Court granting leave to file supplemental complaint.

2/4/80—(38) Supplemental Complaint.

2/21/80—(39) Answer to Supplemental Complaint.

3/28/80—Hearing on Motions.

3/28/80—Argued and held sub curia.

4/11/80—(43) Order of Court granting motion to add additional party.

4/17/80—(44) Opinion of Court.

4/17/80—(45) Order of Court subdividing Plaintiff Class.

5/30/80—Conference on form of Order before Miller, J.

5/30/80—(46) Order of Court.

5/30/80—(46½) Judgment entered in favor of Plaintiffs.

5/30/80—(47) Motion of Defendant to Stay Order.

5/30/80—(48) Notice of Appeal.

6/2/80—(50) Order Granting Stay.

6/24/80—(52) Amended Judgment.

6/27/80—(53) Amended Notice of Appeal.

1/8/81—Argued and held sub curia in Court of Appeals.

3/26/81—Per Curiam Opinion of 4th Circuit affirming District Court decision.

4/14/81—Appellants' Motion to Stay Mandate.

4/15/81—Order Staying mandate for 30 days.

5/11/81—Order Staying mandate for additional 30 days.

6/9/81—Order Staying mandate pending application for a Writ of Certiorari.

6/24/81—Petition for a Writ of Certiorari.

10/5/81—Certiorari granted.

WHAT MAY BE FOUND IN THE APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

1. Opinion of Fourth Circuit filed March 26, 1981.

2. Stay Order of Fourth Circuit filed April 15, 1981.

3. Stay Order of Fourth Circuit filed May 11, 1981.

4. Stay Order of Fourth Circuit filed June 9, 1981.

5. Memorandum of District Court filed October 31, 1979.

6. Memorandum and Order of District Court filed April 17, 1980.

7. Order of District Court filed May 30, 1980.

8. Judgment of District Court filed May 30, 1980.

9. Stay Order of District Court filed May 30, 1980.

10. Amended Judgment of District Court filed June 24, 1980.

11. Opinion and Order of District Court filed July 13, 1976.

12. Stay Order of District Court filed August 3, 1976.

13. Opinion of Fourth Circuit filed April 28, 1977.

14. Order of Fourth Circuit filed May 23, 1977.

15. Stay Order of Fourth Circuit filed May 26, 1977.

16. Opinion of Supreme Court filed April 19, 1978.

17. Certification Order of Supreme Court filed April 25, 1978.

18. Opinion of Court of Appeals of Maryland filed February 21, 1979.

19. Opinion of Supreme Court filed April 30, 1979.

20. Judgment of Supreme Court filed April 30, 1979.

21. United States Code, Title 8, Section 1101(a)(15).

22. University of Maryland, Determination of In-State Status for Admission, Tuition, and Charge-Differential Purposes.

23. A Resolution Clarifying the Purposes, Meaning, and Application of the Policy of the University of Maryland for Determination of In-State Status for Admission, Tuition, and Charge-Differential Purposes, Insofar As It Denies In-State Status to Nonimmigrant Aliens.

VERIFIED COMPLAINT

(Filed May 27, 1975)

(Action for Declaratory and Injunctive Relief)

1. This is an action by three aliens, each of whom resides in Maryland, against the University of Maryland and the President thereof, alleging violations of federal statutory and constitutional rights and seeking declaratory and injunctive relief against the defendants' denying plaintiffs in-state status for admission, tuition, and charge-differential purposes (hereinafter usually referred to as "in-state status").

2. This action arises under Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983; Section 1977 of the Revised Statutes of the United States, 42 U.S.C. § 1981; Sections 201, 202, and 204 of Title II of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000a, 2000a-1, and 2000a-3; Section 601 of Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000d; and the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

3. The jurisdiction of this Court is founded upon 28 U.S.C. § 1343(3) and (4).

4. Venue is present by virtue of 28 U.S.C. 1391(b).

5. Plaintiffs bring this action on behalf of themselves and all other persons residing in Maryland who attend, or desire to attend, defendant University of Maryland and: (1) who hold visas under 8 U.S.C. § 1101(a)(15)(G)(iv) (hereinafter "G-4 visas"); or, (2) who are financially dependent upon the holder of such a visa; or, (3) who pay no federal, state, or local income tax on wages or salary from an international organization under the provisions of an international treaty to which the United States is a party; or, (4) who are financially dependent upon one who pays no such tax on such wages or salary under the provisions of such a treaty. The number of members of

such class is sufficiently numerous that joinder of all members is impracticable. There are questions of law or fact presented herein which are common to the entire class of such persons. The claims of the plaintiffs herein are typical of the claims of such class. The plaintiffs will fairly and adequately protect the interests of such class. Defendants have acted on grounds generally applicable to the class in such a way as to make appropriate final injunctive or declaratory relief with respect to the class as a whole.

6. Plaintiff Juan Carlos Moreno is a native of Paraguay; he has resided in Maryland for fifteen years. He is a student at the University of Maryland.

7. Plaintiff Juan Pablo Otero is a native of Bolivia; he has resided in Maryland for ten years. He is a student at the University of Maryland.

8. Plaintiff Clare B. Hogg is a native of the United Kingdom; she has resided in Maryland for the past five years. She is a student at the University of Maryland.

9. The University of Maryland is a public corporation, chartered under Maryland law, Article 77A § 15(a), Anno. Code of Maryland (hereinafter the "University").

10. Dr. Wilson H. Elkins is the President of the University of Maryland and its chief executive officer (hereinafter the "President").

11. Under Article 77A § 15(e), Anno. Code of Maryland, the Board of Regents of the University "shall exercise with reference to the University . . . all the powers, rights, and privileges that go with the responsibility of management. . . ."

12. On September 21, 1973, the Board of Regents approved a new general policy for the determination of in-state status. Under such general policy the University has denied and continues to deny in-state status to all students who neither are United States citizens nor hold immigrant visas. Students who are United States citizens

or who hold immigrant visa may, under such policy, be granted in-state status, if *inter alia*, they are: (a) financially dependent on parents domiciled in Maryland for at least six consecutive months prior to the close of registration for the semester in question, or (b) financially independent for the preceding twelve months and have themselves maintained domicile in Maryland for the above six-month period.

13. As indicated in Exhibit 1, Attachment 9, and Exhibit 3, Attachment 7, attached hereto, defendants have further determined that:

(a) students who are neither United States citizens nor hold immigrant visas may not be granted in-state status regardless of whether such students or their families have established domicile in Maryland;

(b) students whose parents do not pay Maryland income taxes on income earned from an international organization under the provisions of an international treaty to which the United States is a party may not be granted in-state status because of the "principle of cost equalization" and because the University's "policy reflects the desire to equalize, as far as possible, the cost of education between those who support the University of Maryland through payment of the full spectrum of Maryland taxes, and those who do not"; and

(c) students or their parents who hold G-4 visas are thereby precluded from establishing the requisite intent to establish domicile in Maryland.

14. The University currently requires students other than in-state students to pay significantly higher fees for tuition and other charges, including board charges in some circumstances, and subjects them to more restrictive standards for admission in some circumstances than it does in the case of in-state students.

15. Plaintiffs Moreno, Otero, and Hogg have pursued each and every avenue of administrative review, including

an unsuccessful appeal to the President, within the University of Maryland of the University's decision to deny them in-state status, and have exhausted all their administrative remedies, prior to seeking relief in this Court.

16. Documents verifying certain facts relevant to the domicile of plaintiff Moreno's family, all of which were presented to the defendants during the administrative review within the University, are appended hereto as Exhibit 1, Attachments 1 to 9. Plaintiff Moreno's father, Mr. Manuel A. Moreno, is a citizen of Paraguay and is the holder of a G-4 visa; he has been employed by the Inter-American Development Bank for approximately fourteen years. Manuel Moreno has owned a home in Maryland for the past twelve years. Plaintiff Moreno's mother, Mrs. Gladys M. Moreno, is a citizen of Paraguay and is the holder of a G-4 visa. Manuel and Gladys Moreno own no property in Paraguay, having sold the house which they formerly owned there in 1960. Manuel and Gladys Moreno have paid all Maryland State and Montgomery County property taxes on their home as well as all state and local retail, motor vehicle, fuel, excise and other taxes applicable to them as required by law. Manuel and Gladys Moreno each hold a Maryland driver's license; their automobiles are registered in Maryland. Manuel and Gladys Moreno have not resided anywhere other than in Maryland for the past fourteen years; they have no present intention to reside anywhere other than in the State of Maryland.

17. Manuel and Gladys Moreno are domiciled in the State of Maryland.

18. Plaintiff Moreno has lived with his parents since birth. He has lived in the United States since the age of four, has attended primary and secondary schools in the United States without interruption, and graduated from high school in Maryland. Plaintiff Moreno is a citizen of Paraguay; he now holds a G-4 visa. He holds a Maryland driver's license. He has filed United States and Maryland

income tax returns for 1973 and 1974. Plaintiff Moreno has not resided anywhere other than in Maryland for the past fourteen years; he has no present intention to reside anywhere other than in the State of Maryland.

19. Plaintiff Moreno is domiciled in the State of Maryland.

20. Defendants have denied plaintiff Moreno in-state status, thus subjecting him to higher charges for tuition and other costs than other domiciliaries of Maryland. By so denying plaintiff Moreno in-state status, defendants have violated and are violating such plaintiff's rights under the federal statutes and the clauses of the United States Constitution set forth in paragraph 2 above.

21. Documents verifying certain facts relevant to the domicile of plaintiff Otero's family, all of which were presented to defendants during the administrative review within the University, are appended hereto as Exhibit 2, Attachments 1 to 6. Plaintiff Otero's father, Mr. Rene Otero, is a citizen of Bolivia and is the holder of a G-4 visa; he has been employed by the Inter-American Development Bank for approximately fourteen years. Plaintiff Otero's mother, Mrs. Teresa Bailey Otero, is a citizen of the United States; she is registered to vote in Maryland. Rene and Teresa Otero resided in the District of Columbia from the time of their arrival in the United States in 1960 until 1965, when they moved to Maryland. Rene and Teresa Otero have owned a home in Maryland since 1965 and have resided therein for ten years; they have paid all Maryland State and Montgomery County property taxes thereon as well as all state and local retail, motor vehicle, fuel, excise, and other taxes applicable to them as required by law. Rene and Teresa Otero each hold a Maryland driver's license; Rene Otero's automobile is registered in Maryland. Rene and Teresa Otero own no property in Bolivia. Rene and Teresa Otero have not resided anywhere other than in Maryland for the past ten years; they have no present intention to reside anywhere other than in the State of Maryland.

22. Rene and Teresa Otero are domiciled in the State of Maryland.

23. Plaintiff Otero has lived with his parents since birth. He has lived in the United States since the age of five and has attended primary schools, secondary schools, and college in the United States without interruption. Plaintiff Otero is a citizen of Bolivia; he now holds a G-4 visa; he has made application to adjust his status to that of immigrant. Plaintiff Otero holds a Maryland driver's license. Plaintiff Otero has filed both United States and Maryland income tax returns in 1972, 1973, and 1974, and he has paid income tax to both Maryland and the United States in each of those three years. Plaintiff Otero has not resided anywhere other than in Maryland for the past ten years; he has no present intention to reside anywhere other than in the State of Maryland.

24. Plaintiff Otero is domiciled in the State of Maryland.

25. Defendants have denied plaintiff Otero in-state status, thus subjecting him to higher charges for tuition and other costs than other domiciliaries of Maryland. By so denying plaintiff Otero in-state status, defendants have violated and are violating such plaintiff's rights under the federal statutes and the clauses of the United States Constitution set forth in paragraph 2 above.

26. Documents verifying certain facts relevant to the domicile of plaintiff Hogg's family, all of which were presented to the defendants during the administrative review within the University, are appended hereto as Exhibit 3, Attachments 1 to 9. Plaintiff Hogg's father, Mr. Vincent Hogg, is a citizen of the United Kingdom and is the holder of a G-4 visa; he has been employed by the International Bank for Reconstruction and Development for thirteen years. Plaintiff Hogg's mother, Mrs. Barbara Hogg, and the Hoggs' daughter Susan are citizens of the United Kingdom. Susan Hogg married a United States citizen in 1973 and adjusted her status to that of

permanent resident alien. Vincent and Barbara Hogg resided in the District of Columbia from the time of their arrival in the United States in 1962 until 1970, when they moved to Maryland. They have resided in Maryland for five years except as described below. Vincent and Barbara Hogg own their own home in Maryland as well as a house in which they formerly resided in the District; the house in the District is rented. Vincent and Barbara Hogg own no real property in the United Kingdom with the exception of a small condominium apartment which is currently listed for sale with a real estate agent and which it is their present intention to sell as soon as a sale can be consummated. Substantially all of their personal property and investments are here in the United States with the exception of a bank account in a sum equivalent to approximately five hundred dollars maintained by Vincent Hogg in the United Kingdom for the convenience of paying life insurance premiums and professional journal subscriptions; he does not make payments to the United Kingdom's State Pension Fund. Vincent Hogg's will was written in the United States and represents that he resides in Maryland. Vincent Hogg's automobiles are registered in Maryland. Vincent and Barbara Hogg each hold a Maryland driver's license. They belong to the local civic association in the area in which they reside. Vincent and Barbara Hogg have filed joint United States income tax returns every year since 1963. In 1974 they paid income taxes to both the United States and to the State of Maryland on all income other than Mrs. Hogg's salary from the International Bank for Reconstruction and Development, as well as all state and local retail, motor vehicle, fuel, excise, and other taxes applicable to them as required by law. Vincent and Barbara Hogg have not resided anywhere other than in Maryland for the past five years, with the exception of a period abroad of approximately nine months as part of Vincent Hogg's employment; they have no intention to reside any where other than in the State of Maryland.

27. Vincent and Barbara Hogg are domiciled in the State of Maryland.

28. Plaintiff Hogg has resided with her parents since birth. She has lived in the United States since the age of seven and has attended primary schools, secondary schools, and college in the United States without interruption, with the exception of the approximately nine-month period described in paragraph 26 above. Plaintiff Hogg is a citizen of the United Kingdom; she now holds a G-4 visa; she holds a Maryland driver's license. Plaintiff Hogg has filed both United States and Maryland income tax returns in 1973 and 1974. Plaintiff Hogg has not resided anywhere other than in Maryland for the past five years, with the exception of the approximately nine-month period described in paragraph 26 above; she has no present intention to reside anywhere other than in the State of Maryland.

29. Plaintiff Hogg is domiciled in the State of Maryland.

30. Defendants have denied plaintiff Hogg in-state status, thus subjecting her to higher charges for tuition and other costs than other domiciliaries of Maryland. By so denying plaintiff Hogg in-state status defendants have violated and are violating plaintiff's rights under the federal statutes and the clauses of the United States Constitution set forth in paragraph 2 above.

WHEREFORE plaintiffs pray that this Court

(1) Adjudge and declare that the actions of defendants in denying to plaintiffs in-state status for admission, tuition, and charge-differential purposes are unlawful;

(2) Enjoin the defendants to reclassify the plaintiffs as students having such in-state status;

(3) Enjoin the defendants from further denying to any student in-state status either partially or wholly on the basis that such student or any parent or person on whom such student is financially dependent: (a) is the holder of a

G-4 visa; (b) pays no Maryland State income tax on a salary or wages from an international organization under the provisions of an international treaty to which the United States is a party; or (c) is not domiciled in the State of Maryland by reason of holding such a visa or paying no Maryland State income tax on such salary or wages under the provisions of such a treaty.

(4) Grant to plaintiffs costs, reasonable attorneys' fees, and such other relief as may be proper.

Dated: May 27, 1975

Signatures omitted

Exhibit 1, Attachment 9

UNIVERSITY OF MARYLAND

March 19, 1975

Mr. Alfred L. Scanlon
Shea & Gardner
734 Fifteenth Street, N. W.
Washington, D. C. 20005

Dear Mr. Scanlon:

This is to acknowledge your letter of February 24, 1975. I have reviewed the material relating to "out-of-state" classification of Juan C. Moreno and Juan P. Otero, and I concur in the decision of the Intercampus Review Committee. I am, therefore, denying your appeal.

It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes only to United States citizens and to immigrant aliens lawfully admitted for permanent residence. Furthermore, such individuals (or their parents) must display Maryland domicile. This classification policy reflects the desire to equalize, as far as possible, the cost of education between those who support the University of Maryland through payment of the full spectrum of Maryland taxes, and those who do not. In reviewing these cases, it does not appear that the parents pay Maryland income tax. It is my opinion, therefore, that the aforesaid purpose of the policy, as well as the clear language of the policy, requires the classification of Mr. Moreno and Mr. Otero as "out-of-state."

The University's classification policy also distinguishes between domiciliaries and non-domiciliaries of Maryland. In this regard, it is my opinion, and the position of the University, that the terms and conditions of a G-4 non-immigrant visa preclude establishing the requisite intent necessary for Maryland domicile. Thus, because Mr. Moreno and Mr. Otero are not domiciliaries of Maryland,

and because of the underlying principle of cost equalization, I am denying the requests for reclassification.

Sincerely yours,

WILSON H. ELKINS,

President.

Exhibit 2, Attachment 4

February 24, 1975

Mr. Juan Pablo Otero
3500 Shepard Street
Chevy Chase, Maryland 20015

Dear Mr. Otero:

The Intercampus Review Committee considered your appeal at its recent meeting. I regret to tell you that your request for reclassification to in-state status was denied for spring 1975.

The differential in tuition for in-state and out-of-state fees is based upon the principle that the State of Maryland should subsidize only those individuals who are subject to the full scope of Maryland tax liability. Such taxes support in part the University. The University of Maryland's present classification policies rest upon this principle of cost equalization. In examining the particulars of your case it is felt that neither you nor your parents are subject to the full range of Maryland taxes (e.g., income tax) and therefore the University must classify you as out-of-state with the consequential higher tuition rate.

You have raised the question of domicile. It is our opinion that a holder of a G-4 visa cannot acquire the

requisite intent to reside permanently in Maryland, such intent being necessary to establish domicile.

Sincerely yours,

Judith L. Hirsch
Corresponding Secretary
Intercampus Review Committee

Exhibit 2, Attachment 6

April 3, 1975

Ms. Clare B. Hogg
9704 West Bexhill Drive
Kensington, Maryland 20795

Dear Ms. Hogg:

I am writing in reference to your appeal of the denial of your petition for reclassification for the spring 1975 semester.

In my judgment, the policy for the determination of in-state status limits the ability to establish an in-state classification to United States citizens and immigrant aliens admitted to the United States for permanent residence. As the person upon whom you are dependent holds a G-4 visa, and as you hold a G-4 visa, in my judgment you are not eligible for an in-state classification.

Also, the person upon whom you are dependent does not pay Maryland income tax on all earned income, including income earned outside the state. I feel this further weakens your request for reclassification as this is an important criteria in determination of domicile.

If you wish to appeal my decision, your next appeal is to the University's Intercampus Review Committee. The next

scheduled committee meeting is April 8, 1975. If you wish your appeal to be considered at this meeting, please send your written appeals letter to the attention of Mr. Wayne Sigler no later than the end of the working day April 7, 1975.

I regret that I cannot be of more assistance to you at this time.

Sincerely,

George E. Raley, Jr.
Assistant Director
of Admissions

Exhibit 3, Attachment 9

UNIVERSITY OF MARYLAND

May 14, 1975

Mr. Alfred L. Scanlan
Shea & Gardner
734 Fifteenth Street, N.W.
Washington, D.C. 20005

Dear Mr. Scanlan:

This is to acknowledge your letter of April 30, 1975 appealing the decision of the Intercampus Review Committee concerning the classification of Ms. Clare B. Hogg as an out-of-state resident. I have reviewed all of the material concerning her appeal, and I concur in the decision of the Intercampus Review Committee that she be classified as an out-of-state resident.

It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes only to United States citizens and to immigrant aliens lawfully admitted for permanent residence. Furthermore, such individuals (or their parents) must display Maryland domicile. The University's classi-

fication policy distinguishes between domiciliaries and non-domiciliaries of Maryland. In this regard, it is my opinion, and the position of the University, that the terms and conditions of a G-4 non-immigrant visa preclude establishing the requisite intent necessary for Maryland domicile.

This classification policy reflects the desire to equalize, as far as possible, the cost of education between those who support the University of Maryland through payment of the full spectrum of Maryland taxes and those who do not.

In reviewing this case, it does not appear that the parents pay Maryland income tax. It is my opinion, therefore, that the aforesaid purpose of the policy, as well as the clear language of the policy, requires the classification of Ms. Hogg as out-of-state.

Sincerely yours.

WILSON H. ELKINS,
President.

AFFIDAVIT OF ARNOLD H. WEISS

(Filed October 6, 1975)

DISTRICT OF COLUMBIA SS:

Arnold H. Weiss, being first duly sworn, deposes and states as follows:

1. I am the General Counsel of the Inter-American Development Bank, a public international organization located in Washington, D.C. I am fully familiar with the personnel policies of the Bank and the legal requirements related thereto.

2. Article VIII, Section 5(e) of the Agreement Establishing the Inter-American Development Bank, 10 U.S.T. 3029, T.I.A.S. No. 4397 provides that "[d]ue regard shall be paid to the importance of recruiting the staff on as wide a geographic basis as possible."

3. Title 1, Section 101(a) of the Immigration and Nationality Act provides for a separate visa classification for officers, or employees of international organizations, and members of their immediate families. 8 USC Sec. 1101(a)(15)(G)(iv).

4. Pursuant to the matters referred to in paragraphs 2 and 3 above, it is the policy of the Bank not to assist any of such persons in adjusting or otherwise changing their visa status from that provided under 8 USC Sec. 1101(a)(15)(G)(iv) to any other visa status.

5. No authorized representative of the Bank files, signs, or otherwise approves U.S. Department of Labor form MA7-50A (Statement of Qualifications of Alien) or MA7-50B (Job Offer for Alien Employment); or to my knowledge has ever done so.

6. The three attachments are copies of letters from the files of the Inter-American Development Bank:

(A) May 20, 1965, letter from Dr. Wilson H. Elkins, President of the University of Maryland, to Mr. Paul A. Colborn, Chief of the General Legal Division of the Pan American Union;

(B) December 27, 1965, letter from Mr. Roy M. Walsh, of the Inter-American Development Bank to Mr. G. Watson Algire, Director of Admissions of the University;

(C) January 7, 1966, letter from Mr. Algire to Mr. Walsh, responding to (B) above.

ARNOLD H. WEISS

May 20, 1965

Mr. Paul A. Colborn, Chief
General Legal Division
The Pan American Union
Washington 6, D.C.

Dear Mr. Colborn:

Since receiving your letter of April 13 we have been considering the tuition rates for employees of international organizations. I note from your letter that no income tax, federal or state, is levied on the salaries of non-citizen employees of certain international organizations, and in each case this is by virtue of a treaty. You also say that liability for the state income tax varies with the jurisdiction and that all alien employees of international organizations are exempted from the tax in the State of Maryland.

The tuition rate at the University of Maryland is determined mainly by domicile. Since this is the case, we have decided that it would be fair to all parties concerned to classify in accordance with domicile: that is, for minors, the parents must own (personally) and occupy property in the State of Maryland for a period of six months before

residency status will be granted. For the adult, the same will hold. This ruling is not to be considered retroactive. I believe that this interpretation of our resident and non-resident status is proper and that it will be fair to the employees of the Pan American Union and other international organizations.

With kindest regards, I am

Sincerely yours,

WILSON H. ELKINS,
President.

December 27, 1965

Mr. G. Watson Algire
Dean of Admissions
University of Maryland
College Park, Maryland

Dear Dean Algire:

Last Tuesday, I spoke to Mrs. Will in regard to the attached letter and she recommended that I write to you. My purpose is to receive confirmation from the University of Maryland that the ruling on classification of non-citizen employees in accordance with domicile, as contained in the attached letter, is also applicable to that category of employees in this Bank. Further, I understand that this ruling is applicable to both tuition and boarding rates.

The Inter-American Development Bank is an international organization of which all the members are governments. It was established and is operating under the Agreement Establishing the Bank signed by these governments (copy attached). Article XI of the Agreement establishes, among other things, certain privileges and immunities for officials and employees of the Bank, including immunity from taxation. The United States of America became a member of the Bank pursuant to the

Inter-American Development Bank Act (Public Law 86-147, copy attached). Section 9 of said Act gives full force and effect in the United States to Article XI of the Agreement. The privileges and immunities of the International Organization Privileges and Immunities Act were extended to the Inter-American Development Bank by virtue of Executive Order 1033, April 8, 1960, copy attached.

Should you require any additional information, please do not hesitate to let me know. In the meantime, I thank you for your consideration of this matter and hope that the information contained herein proves sufficient for you to make a decision.

Sincerely yours,

ROY M. WALSH,
Office of Personnel

January 7, 1966

Mr. Roy M. Walsh
Office of Personnel
Inter-American Development Bank
Washington 25, D.C.

Dear Mr. Walsh:

I am replying to your letter of December 27 concerning the classification of Maryland residence for fee-paying purposes at the University.

If you will recall, you enclosed a copy of a letter dated May 20, 1965 from Dr. Wilson H. Elkins to Mr. Paul A. Colborn, Chief, General Legal Division, The Pan American Union. The intent of this decision is to grant Maryland residence status for fee-paying purposes at the University of Maryland to those employees of international organizations who are living in the State of Maryland and are in this country on a G4 visa only. This is, of course, granted in the case of minors provided the parents

personally own and occupy property in the State of Maryland for a period of six months before such residence status is granted. The same privilege is extended to adults.

I hope this answers the questions raised in your letter of December 27.

Sincerely yours,

G. WATSON ALGIRE,
Director of Admissions
and Registrations

AFFIDAVIT OF HUGH N. SCOTT

(Filed October 6, 1975)

DISTRICT OF COLUMBIA SS:

Hugh N. Scott, being first duly sworn, deposes and states as follows:

1. I am Assistant General Counsel of the International Bank for Reconstruction and Development in Washington, D.C. I am fully familiar with the personnel policies of the Bank and the legal requirements related thereto.

2. Article V, Section 5(d) of the Articles of Agreement of the International Bank for Reconstruction and Development, 60 Stat. 1440, T.I.A.S. No. 1502 provides that "[i]n appointing the officers and staff, the President shall, subject to the paramount importance of securing the highest standards of efficiency and of technical competence, pay due regard to the importance of recruiting personnel on as wide a geographic basis as possible." Pursuant to this requirement for some years it has been neither the policy nor the practice for the Bank to assist any of its employees in adjusting or otherwise changing their visa status from one in which such employee holds a visa under 8 U.S.C. 1101(a)(15)(G)(iv) to one in which he holds an immigrant visa; thus neither the Bank nor its

authorized representative files, signs, or otherwise approves U.S. Department of Labor form MA7-50A (Statement of Qualifications of Alien) or MA7-50B (Job Offer for Alien Employment).

HUGH N. SCOTT

ANSWER

(Filed June 25, 1975)

Defendants, University of Maryland and Dr. Wilson H. Elkins, President, University of Maryland, by Francis B. Burch, Attorney General of Maryland, Estelle A. Fishbein, David H. Feldman, and Jack T. Roach, Assistant Attorneys General, their attorneys, in answer to the Verified Complaint* filed herein, state:

First Defense

This Honorable Court lacks jurisdiction over the subject matter of the rights of action alleged in the Complaint.

Second Defense

This Honorable Court lacks jurisdiction over the person of Defendants University of Maryland and Dr. Wilson H. Elkins, in his capacity as President, University of Maryland.

Third Defense

The Complaint fails to state a claim upon which relief can be granted.

Fourth Defense

The Complaint fails to state a claim as a class action upon which relief can be granted.

Fifth Defense

The Complaint fails to state a claim upon which class relief can be granted.

Sixth Defense

The Complaint fails to join parties under Rule 19 of the Federal Rules of Civil Procedure.

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* Although "Verified," the Complaint need not have been since no temporary restraining order was sought, *see* FED. R. CIV. P. 65(b), and thus the verification is of no effect, *see* FED. R. CIV. P. 11.

SEVENTH DEFENSE

Plaintiffs, Juan Carlos Moreno, Juan Pablo Otero, and Clare B. Hogg, lack standing to bring the rights of action alleged in the Complaint.

EIGHTH DEFENSE

Plaintiffs, Juan Carlos Moreno, Juan Pablo Otero, and Clare B. Hogg, are not proper parties plaintiff to the Complaint.

NINTH DEFENSE

No case or controversy exists between Plaintiffs, Juan Carlos Moreno, Juan Pablo Otero, and Clare B. Hogg, on the one hand, and Defendants, University of Maryland and Dr. Wilson H. Elkins, in his capacity as President, University of Maryland, on the other hand.

TENTH DEFENSE

This Honorable Court should abstrain from exercising any jurisdiction it may possess in this action until it shall have been heard and determined fully by the courts of Maryland.

ELEVENTH DEFENSE

1. Defendants deny the allegations contained in paragraph 1 of the Complaint, except that Defendants admit that Plaintiffs are aliens.

2. Defendants deny the allegations contained in paragraph 2 of the Complaint.

3. Defendants deny the allegations contained in paragraph 3 of the Complaint.

4. Defendants admit the allegations contained in paragraph 4 of the Complaint.

5. Defendants deny the allegations contained in paragraph 5 of the Complaint.

6. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 of the Complaint, except that Defendants admit that Plaintiff Juan Carlos Moreno is a student at the University of Maryland and deny that Plaintiff Juan Carlos Moreno has resided in Maryland for fifteen years.

7. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7 of the Complaint, except that Defendants admit that Plaintiff Juan Pablo Otero is a student at the University of Maryland and deny that Plaintiff Juan Pablo Otero has resided in Maryland for ten years.

8. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the Complaint, except that Defendants admit that Plaintiff Clare B. Hogg is a student at the University of Maryland and deny that Plaintiff Clare B. Hogg has resided in Maryland for the past five years.

9. Defendants admit the allegations contained in paragraph 9 of the Complaint.

10. Defendants admit the allegations contained in paragraph 10 of the Complaint.

11. Defendants admit the allegations contained in paragraph 11 of the Complaint.

12. Defendants admit the allegations contained in paragraph 12 of the Complaint, except that Defendants deny that the University has denied and continues to deny in-state status to all students who neither are United States citizens nor hold immigrant visas.

13. Defendants deny the allegations contained in paragraph 13 of the Complaint and all subparts thereof, except that Defendants admit that they have determined that

students or their parents who hold G-4 visas are precluded from establishing the requisite intent to establish domicile in Maryland.

14. Defendants deny the allegations contained in paragraph 14 of the Complaint.

15. Defendants admit the allegations contained in paragraph 15 of the Complaint.

16. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 16 of the Complaint, except that Defendants admit that copies of the documents, appended to the Complaint as Exhibit 1, Attachments 1 to 9, were presented to Defendants during the administrative review within the University, and deny that Manuel and Gladys Moreno have not resided anywhere other than in Maryland for the past fourteen years and that they have no present intention to reside anywhere other than in the State of Maryland.

17. Defendants deny the allegations contained in paragraph 17 of the Complaint.

18. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 18 of the Complaint, except that Defendants deny that Plaintiff Moreno has not resided anywhere other than in Maryland for the past fourteen years and that he has no present intention of residing anywhere other than the State of Maryland.

19. Defendants deny the allegation contained in paragraph 19 of the Complaint.

20. Defendants deny the allegations contained in paragraph 20 of the Complaint.

21. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 21 of the Complaint, except that

Defendants admit that copies of the documents, appended to the Complaint as Exhibit 2, Attachments 1 to 6, were presented to Defendants during the administrative review within the University, and deny that Rene and Teresa Otero have not resided anywhere other than in Maryland for the past ten years and that they have no present intention to reside anywhere other than in the State of Maryland.

22. Defendants deny the allegations contained in paragraph 22 of the Complaint.

23. Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 23 of the Complaint, except that Defendants deny that Plaintiff Otero has not resided anywhere other than in Maryland for the past ten years and that he has no present intention to reside anywhere other than in the State of Maryland.

24. Defendants deny the allegations contained in paragraph 24 of the Complaint.

25. Defendants deny the allegations contained in paragraph 25 of the Complaint.

26. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 26 of the Complaint, except that Defendants admit that copies of the documents, appended to the Complaint as Exhibit 3, Attachments 1 to 9, were presented to Defendants during the administrative review within the University, and deny that Vincent and Barbara Hogg have not resided anywhere other than in Maryland for the past five years, with the exception of a period of approximately nine months as part of Vincent Hogg's employment, and that they have no present intention to reside anywhere other than in the State of Maryland.

27. Defendants deny the allegations contained in paragraph 27 of the Complaint.

28. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 28 of the Complaint, except that Defendants deny that Plaintiff Hogg has not resided anywhere other than in Maryland for the past five years, with the exception of the approximately nine-month period described in paragraph 26 above, and that she has no present intention to reside anywhere other than in the State of Maryland.

29. Defendants deny the allegation contained in paragraph 29 of the Complaint.

30. Defendants deny the allegations contained in paragraph 30 of the Complaint.

WHEREOF, Defendants respectfully pray that:

(1) The relief requested in the Complaint be denied.

(2) All costs of these proceedings be assessed against Plaintiffs.

Signatures omitted.

UNIVERSITY OF MARYLAND — POSSIBLE ADJUSTMENTS OF TUITION AND OTHER CHARGES

(Issued by the World Bank, August 16, 1976)

The University of Maryland has long differentiated between individuals who are "resident" (domiciled) in the State of Maryland and individuals who are "non-resident" in the state for purposes of admitting students and charging amounts for tuition and other fees. This is a policy common to most, perhaps all, public universities in the United States. At the University of Maryland, students who are determined to be residents of Maryland are referred to as having "in-state" status; others are in "out-of-state" status.

Beginning in 1974, the University limited eligibility for in-state status to students who are (or students whose spouse or parents are) United States citizens or who are admitted to the United States for permanent residence on immigrant visas. Three students who are G-iv visa holders or whose parents are G-iv visa holders commenced litigation against the University to contest the validity of these limitations. On July 13, 1976, the United States District Court for the District of Maryland decided that a rule which prevented G-iv visa holders from demonstrating that they were domiciled in Maryland was invalid by reason of the due process clause of the United States Constitution, and directed that the rule not be enforced.

The University has decided to appeal this decision to the United States Court of Appeals for the judicial circuit which includes Maryland. Because the appeal is not frivolous, the District Court, following procedures used frequently, has suspended enforcement of its own decision until the appeal is decided. This means that students who are classified as out-of-state by reason of G-iv status will continue to be treated as out-of-state unless and until the decision of the District Court is affirmed by the Court of Appeals.

However, if the decision of the District Court is affirmed, the University will refund the difference between the out-of-state and in-state tuition and other charges for all semesters beginning with the fall 1976 semester if the student would have been classified as in-state for those semesters under the District Court's decision and if the student applies to the Director of Admissions at the University for reclassification from out-of-state to in-state before the last day available for registration for the fall 1976 semester. On receipt of such application, the University will reply that the request will be held in abeyance pending the outcome of the appeal.

If you reside in the State of Maryland and if you or your spouse or child is classified as an out-of-state student by reason of G-iv visa status, the student should apply for reclassification to in-state status before the time indicated.

Staff members who, under the provisions of Personnel Manual Circular No. Pers/6/76 of April 26, 1976, are eligible for the Bank's tuition equalization subsidy with respect to the education of their dependent children at the University of Maryland must submit to the Personnel Department the following documentation in order to obtain the appropriate reimbursement from the Bank:

(a) Receipted bills for the tuition paid;

(b) Copies of the application to the Director of Admissions of the University for a reclassification from out-of-state to in-state status, and the Director of Admission's reply thereto; and

(c) Documentation from the University of Maryland listing the resident and non-resident tuition charges.

If the amounts reimbursed to the staff member by the Bank are ultimately refunded by the University, the staff member will, of course, be required to repay the Bank.

August 16, 1976

LETTER TO SUPREME COURT

February 28, 1979

Michael Rodak, Jr., Esquire
Clerk
Supreme Court of the United States
Supreme Court Building
1 First Street, N.E.
Washington, D. C. 20543

Re: Wilson H. Elkins, President, University of Maryland v. Juan Carlos Moreno, et al., No. 77-154

Dear Mr. Rodak:

Mr. Justice Brennan delivered the opinion of the Court in the above-referenced case on April 19, 1978, Mr. Justice Rehnquist with whom the Chief Justice joined dissenting. In furtherance of the Court's opinion, Mr. Justice Brennan signed a separate order dated April 25, 1978, certifying a question of state law to the Court of Appeals of Maryland.

On June 23, 1978, the Board of Regents of the University of Maryland unanimously adopted a Resolution Clarifying the Purposes, Meaning, and Application of the Policy of the University of Maryland for Determination of In-State Status for Admission, Tuition, and Charge Differential Purposes, Insofar As It Denies In-State Status to Nonimmigrant Aliens. A certified copy of the resolution reaffirming the Board's policy was transmitted to you at that time for the Court's information, and a separate copy is enclosed with this letter for your convenience.

In an opinion filed on February 21, 1979, *sub nomine John S. Toll, President, University of Maryland v. Juan Carlos Moreno, et al.*, the Court of Appeals of Maryland answered the certified question; an informational copy of the opinion is enclosed with this letter, and we understand that the Clerk of the Court of Appeals of Maryland has sent one to Justice Brennan. Because Rule 850 of the Maryland Rules of Procedure allows a motion for reconsid-

eration to be filed within thirty days after the opinion has been filed, however, the official certified copy of the opinion of the Court of Appeals of Maryland provided for in Rule 896d, in lieu of the formal mandate normally issued under Rule 876, will not be forwarded to you until March 22, 1979, at which time the record also will be returned.

In light of the resolution unanimously adopted by the Board of Regents of the University of Maryland on June 23, 1978, and the opinion of the Court of Appeals of Maryland filed February 21, 1979, the petitioner has instructed this office to request that the case be restored to the Supreme Court's active docket for further briefing and argument at the earliest time deemed convenient and appropriate by the Court. Allowance of this request would provide the parties with the opportunity to make a focused presentation to the Court which we believe would be of genuine assistance to it in the resolution of the constitutional issues presented by this case in its present posture.

Please advise us when you are able to do so of the Court's disposition of the petitioner's request contained in this letter. Thank you for your assistance and cooperation in this regard.

Sincerely yours,

David H. Feldman
Assistant Attorney General
Chief of Litigation

LETTER TO SUPREME COURT

March 29, 1979

Michael Rodak, Jr., Esquire
Clerk
Supreme Court of the United States
Supreme Court Building
1 First Street, N.E.
Washington, D. C. 20543

Re: Toll v. Moreno et al.
No. 77-154

Dear Mr. Rodak:

This is in response to your letter of March 24, 1979, in which you convey the Court's request that appellees respond to Mr. Feldman's letter to you dated February 28, 1979. In his letter, Mr. Feldman requests that "further briefing and argument" be allowed by the Court in this case.

It is the appellees' view that neither additional briefing nor further oral argument is necessary or appropriate in this case. Mr. Feldman's letter makes clear that the appellant wants such further briefing and argument to discuss a resolution adopted by the University of Maryland on July 23, 1978, subsequent to this Court's opinion in this case. A reading of that resolution will reveal that it is a *post hoc* attempt to avoid the impact of this Court's prior decision and to sidestep an adverse ruling by the Maryland Court of Appeals, and that it is irrelevant to this Court's resolution of this case. In its prior opinion, this Court stated that the "University has consistently maintained . . . that . . . its 'paramount' and controlling concern is with domicile as defined by the courts of Maryland," 435 U.S. 647, 658-59; and it thus certified to the Maryland Court of Appeals the "potentially dispositive" question whether G-4 aliens can be domiciled in Maryland under the Maryland common law, *id.* at 668. The University's new resolution, however, states that the University's policy adopted, for purposes of in-state tuition

and fees, its own, more restrictive definition of domicile, which does not depend on the definition of domicile under Maryland law and which precludes all nonimmigrant (including G-4) aliens from showing Maryland domicile, regardless of whether they can acquire Maryland domicile under the state common law.

Through this resolution, then, the appellant is seeking (as he vainly attempted to do in brief and oral argument in the Maryland Court of Appeals) to raise a new ground — one which he did not assert or argue in the trial court, in the United States Court of Appeals for the Fourth Circuit, or in this Court. This untimely claim or ground, therefore, is one which should not now be considered by this Court. *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970).

The case remains in the identical posture in which it was when this Court certified to the Court of Appeals of Maryland the "potentially dispositive" question of whether there was anything in the Maryland law of domicile to preclude the holder of a G-4 visa from showing he was domiciled in Maryland. The Court of Appeals now has answered that question in the negative. Remaining for determination by the Supreme Court are only the issues of due process, as applied in *Vlandis v. Kline*, 412 U.S. 441 (1973) and equal protection, as applied in *Nyquist v. Mauclet*, 432 U.S. 1 (1977). These constitutional issues have been extensively briefed and, appellees believe, fully argued by the parties to the Court. No further briefs or oral arguments are required.

Respectfully submitted,

Alfred L. Scanlon
Attorney for Appellees.

LETTER TRANSMITTING PROPOSED ORDER

November 26, 1979

The Honorable James R. Miller, Jr.
United States District Judge
United States District Court for the
District of Maryland
Room 510, U.S. Court House
101 W. Lombard Street
Baltimore, Maryland 21201

Re: Moreno, *et al.* v. John S. Toll Civil Action No. M-75-691

Dear Judge Miller:

Enclosed are the original and one (1) copy of plaintiffs' proposed order to carry out your memorandum opinion of October 31, 1979 which dealt with the pre-June 23, 1978 aspects of this case.

A copy of this letter together with the proposed Order has been mailed to Mr. Feldman.

Sincerely yours,

Alfred L. Scanlan

PROPOSED ORDER

For the reasons stated in the Court's memorandum opinion filed on October 31, 1979, it is this day of , 1980, hereby ORDER, ADJUDGED and DECREED that:

1. Prior to June 23, 1978, the paramount and controlling concern of the University of Maryland under its "In-state Policy" was with domicile in Maryland according to state law.

2. The Court of Appeals of Maryland having determined that G-4 visaholders may be domiciled in Maryland according to state law principles, plaintiffs and the class whom they represent are entitled to the benefits of in-state status prior to June 23, 1978, provided that such persons can show that they, or the person or persons upon whom they were financially dependent, were in fact domiciled in Maryland according to state law principles.

3. The University of Maryland's In-State Policy, as enforced prior to June 23, 1978, to flatly deny to all G-4 visaholders the opportunity to prove that they were domiciled in Maryland according to state law principles, was unconstitutional as a violation of the Due Process Clause of the Fourteenth Amendment.

4. At the request of any person who attended the University as a student during the period from the Spring term of 1974 through the Spring term of 1978 and who held a G-4 visa or was financially dependent upon a G-4 visaholder, the University of Maryland shall make the following determination: whether, for each term in which such student was enrolled at the University, such student (if financially independent) or the person or persons upon whom such student was financially dependent was domiciled in the state of Maryland according to state law principles for six consecutive months prior to the beginning of that term.

5. In making such determinations of domicile, the University shall apply the same standards, and apply them in the same way, as it does in determining whether a citizen or permanent resident alien is domiciled in Maryland, and shall not determine that a person was a nondomiciliary of Maryland on the ground that he or she either held a G-4 visa or was exempt from state and local income taxation on a salary or wages from an international organization by virtue of an international agreement to which the United States is a party.

6. After the University has determined in a particular case pursuant to paragraphs 4 and 5 of this Order that a student was entitled to in-state status, it shall refund to such person, with interest, the difference between the "out-of-state" tuition and charges actually paid to the University by such student and the lesser fees and charges which the student would have paid if he or she had enjoyed in-state status.

7. The Court reserves the question of court costs and attorneys' fees.

United States District Judge

LETTER TRANSMITTING PROPOSED ORDER

December 12, 1979

The Honorable James R. Miller
United States District Judge
United States Court House
101 West Lombard Street
Baltimore, Maryland 21202

Re: *Moreno, et al. v. Toll*
Civil Action No. M-75-691

Dear Judge Miller:

Enclosed are the original and two copies of the defendant's proposed order, to be issued at the conclusion of the entire case, to give effect to the memorandum of the Court filed October 31, 1979, that deals with the pre-June 23, 1978, aspects of this case. Because the defendant's proposed order differs significantly from the plaintiffs' proposal forwarded to the Court on November 26, 1979, an explanation might be helpful to the Court, and it follows.

The defendant does not believe that the language in numbered paragraphs one or two is either necessary or supported fully by the memorandum of the Court. The proposed orders both advert to the reasons stated in the memorandum of October 31, 1979, and that memorandum speaks for itself. For example, the memorandum discusses whether the "paramount" concern of the University under the Policy before June 23, 1978, was domicile, not whether domicile was the "paramount and controlling" concern as the plaintiffs now wish included in the first numbered paragraph of the order. In addition, the entitlement, if any, of certain persons to in-state status, referred to in the second numbered paragraph, flows from this Court's constitutional pronouncement, not from any decision of the Court of Appeals of Maryland. For these reasons, and because the inclusion of numbered paragraphs one and two is gratuitous and unnecessary to give effect to the memorandum, the defendant believes that these paragraphs should *not* be included in the order.

The defendant does not differ with the thrust of numbered paragraph three of the plaintiffs' proposed order; however, he suggests that the alternative language he proposes, which is modeled on numbered paragraph five of the order of July 13, 1976, is more faithful to the holding of the memorandum of October 31, 1979.

The defendant submits that numbered paragraphs four, five, and six of the plaintiffs' proposed order should *not* be included. First, he believes that all of the relief afforded by numbered paragraph six is barred by the Eleventh Amendment to the United States Constitution. Second, the granting of relief in numbered paragraph four to persons who were affected by the policy before July 13, 1976, the date of the original order of the Court, is the grossest form of retroactive monetary relief and goes far beyond both the order of July 13, 1976, and the terms of the order granting a stay of August 3, 1976. Finally, the defendant believes that the order should *not* contain the four and one-half lines of numbered paragraph five, purporting to disallow consideration in the in-state determination process of exemption "from state and local taxation on a salary of wages from an international organization by virtue of an international agreement to which the United States is a party." This language is *not* supported by either the original opinion of July 13, 1976, or the memorandum of October 31, 1979, and indeed is part of the new relief prayed for in paragraph (2)(b) on page three of the plaintiffs' proposed supplemental complaint, the appropriateness of which relief depends on a determination of the supremacy clause claim contained in the proposed supplemental complaint.

With the understanding that he does *not* thereby waive his ability to object to an award to the plaintiffs, the defendant accepts the language of numbered paragraph seven, and it is included in his proposed order.

In summary, the defendant urges that the proposed order of the plaintiff contains unnecessary, erroneous, and

gratuitous language and affords relief that is unsupported by the Constitution or the opinions of the Court. For these reasons, the defendant requests that the order to be issued by the Court at the conclusion of the case that will give effect to the memorandum of October 31, 1979, be in substance as contained in the proposed order attached to this letter.

The Court's consideration of the defendant's views as expressed in this letter is appreciated.

Respectfully yours,

DAVID H. FELDMAN

PROPOSED ORDER

For the reasons stated in the Court's memorandum filed on October 31, 1979, it is this day of , 1980, by the United States District Court for the District of Maryland, hereby ORDERED:

1. That before June 23, 1978, the "In-State Policy" of the University of Maryland, which denied to G-4 aliens by use of an irrebutable presumption of non-domicile the opportunity to establish "in-state" status, was unconstitutional as it was in violation of the Due Process Clause of the Fourteenth Amendment; and

2. The Court reserves the question of court costs and attorneys' fees.

United States District Judge

LETTER TRANSMITTING PROPOSED ORDER

January 15, 1980

The Honorable James R. Miller, Jr.
United States District Judge
United States District Court for
the District of Maryland
Room 510, U.S. Court House
101 W. Lombard Street
Baltimore, Maryland 21201

Re: Moreno et al. v. John S. Toll, Civil Action No. M-75-691

Dear Judge Miller:

On November 26, 1979, we mailed to you a copy of plaintiffs' proposed order to carry out your memorandum opinion of October 31, 1979, which dealt with the pre-June 23, 1978, aspects of this case. Mr. Feldman, counsel for defendant, replied in a letter dated December 12, 1979, in which he objected to various portions of plaintiffs' proposed order. He attached, in addition, his own proposed order. At the same time, defendant served and filed defendant's answer to plaintiffs' proposed order. He attached, in addition, his own proposed order. At the same time, defendant served and filed defendant's answer to plaintiffs' motion for leave to file supplemental complaint and to add party plaintiff.

Consideration of these papers has led us to submit a revised proposed order, enclosed herewith, to clear up certain ambiguities that appear in the current definition of the class and clarify other aspects of the case — particularly, the Eleventh Amendment issues raised by Mr. Feldman. This revised proposed order supersedes the proposed order submitted on November 26, 1979.

In the first place, we believe that the class certified by the Court in its opinion and order of July 13, 1976, 420 F. Supp. 541, 564 (Record at 437), should be redefined pursuant to Fed. R. Civ. P. 23(c)(1), both to eliminate any

possible ambiguities stemming from the use of the present tense in that order and to reflect the division of the case into two parts — that dealing with the policy as it was in effect prior to June 23, 1978, and that dealing with the policy as it has been in effect since June 23, 1978. Accordingly, the revised proposed order, in ¶4, redefines the class represented by plaintiffs for the purpose of their challenge to the policy as it was in effect prior to June 23, 1978, and clarifies it. We anticipate proposing a similar redefinition and clarification of the class represented by plaintiffs for the purpose of their challenge to the policy as it has been in effect since January 23, 1978, as soon as the Court has ruled on that part of the case.

The remainder of the revisions to the proposed order are to clarify certain aspects of the case and, in particular, to clarify why Mr. Feldman's Eleventh Amendment objection to any back tuition relief is misplaced.[1] We do agree that Mr. Feldman is correct that no back tuition relief is appropriate as to the period prior to the Court's first order granting relief. The complaint was for "injunctive and declaratory relief only," 420 F. Supp. at 550 (Record at 407); that is, it sought only prospective relief. That relief was ordered by the Court on July 13, 1976, and that order, as subsequent proceedings have finally shown, was fully justified as to the period of time up to June 23, 1978. We propose that the Court's order make this point by reaffirming the July 13, 1976, order to that extent, and we have added language (¶ 3) to this effect. (Paragraph 5 then repeats the relevant language of the order and makes it

[1] Mr. Feldman objected to paragraphs 1 and 2 of the original proposed order on the ground that they were not supported by the Memorandum Opinion of October 31, 1979, and were "gratuitous and unnecessary." While we agree that the Memorandum Opinion "speaks for itself," we believe that inclusion of the points made in those paragraphs lends clarity to the order. To avoid any quibbles about precise wording, we have rewritten those two paragraphs; paragraph 1 of the revised proposed order contains language taken directly from the Memorandum Opinion at p. 20.

applicable to defendant Toll, the successor to President Elkins.)

While the July 13, 1976, order granted prospective relief only, and thus avoided any Eleventh Amendment issues of the kind raised by defendant, that order was stayed pending appeal. Order of August 3, 1976, Record at 459. A condition of the stay, however, was defendant's express representation, embodied in the stay order itself, that in the event the Court's Order of July 13, 1976, was "finally affirmed on appeal," the University would refund the relevant difference in tuition to "each student whose status is current determined by a G-4 visa and whose request for reclassification, if filed prior to the last day available for registration for the fall 1976 semester, would have been granted but for the stay." Without that agreement, which, at the very least, is an express waiver of any Eleventh Amendment immunity, the stay order would not have been granted. Paragraph 6 of the proposed order merely holds the University to this agreement and, together with paragraphs 8 and 9, provides for enforcement of that agreement.

We realize that defendant may take the position that the court's Order of July 13, 1976, has not yet been "finally affirmed on appeal," and so the stay will remain in effect until final disposition of the appeals that may follow the Court's orders after this round of decisions.We believe that such a position would be incorrect. The Court necessarily must issue an order after its reconsideration of the Order of July 13, 1976 — a reconsideration mandated by the Supreme Court. Even if that order, either in whole or in part, announces the Court's adherence to its original order, it is still the *latest* order which will be appealed to the Court of Appeals. While we expect the defendant to appeal the Court's order, at least as it concerns the pre-June 23, 1978 issues upon which defendant has already lost, we suggest that the merits of any stay pending appeal of that order, and the terms of a stay if one is granted, should be considered when the matter arises.

For the foregoing reasons, ¶ 6 of the proposed order has no Eleventh Amendment problems because it is based on defendant's express waiver of any such issues as a condition of the stay order of August 3, 1976.

Paragraphs 7 and 8 of the proposed order, which parallel paragraphs 4 and 5 of the original proposed order, merely clarify and make specific the procedures that the defendant is to follow in complying with ¶ 6. Mr. Feldman objects to the part of ¶ 8 (¶ 5 of the original proposed order) stating that the defendant "shall not determine that a person was a nondomiciliary of Maryland on the ground that he or she either held a G-4 visa or was exempt from state and local income taxation on a salary or wages from an international organization by virtue of an international agreement to which the United States is a party." He claims that this clause "purport[s] to disallow consideration in the in-state determination process of [the international-organization employees' tax] exemption * * *." (P. 2.) He says that this language is not supported by either the original opinion of July 13, 1976, or the memorandum of October 31, 1979, and that it "indeed is part of the new relief prayed for in * * * the plaintiffs' proposed supplemental complaint * * *." (*Id.*)

Mr. Feldman's objection appears to reflect a misunderstanding of the words in question. The sole purpose of the disputed clause is to make clear what is indicated in the preceding clause — *i.e.*, that the defendant shall apply to the plaintiffs the usual state law standards for domicile. This Court has already decided that domicile under state law principles was the controlling concern of the University prior to the June 23, 1978, Clarifying Resolution. Accordingly, domicile under such principles is the only relevant consideration for in-state status for that period. See Memorandum Opinion of October 31, 1979, pp. 18-20. The language in question merely prohibits the defendant from holding that a class member is not domiciled in Maryland *solely because* he or she either held a G-4 visa or "was exempt from state and local income taxation on a

salary or wages from an international organization by virtue of an international agreement to which the United States is a party." This prohibition reflects the holding of the Court of Appeals of maryland in *Toll v. Moreno*, 397 A.3d 1009, 1018 (1979), where the Court held that nothing inherent in the nature of a G-4 visa, nor the tax-exempt nature of the salaries that such visaholders receive from international organizations, renders such visaholders "absolutely incapable of establishing a Maryland domicile." Accordingly, we do not believe that Mr. Feldman has any ground for objecting to the language as a limitation on the circumstances under which defendant can hold a class member not domiciled in Maryland.

Nor is it correct to say, as Mr. Feldman does, that the language in question "is part of the new relief prayed for" in the proposed supplemental complaint. As shown above, the clause in question relates directly to the determination of domicile under state law principles, which is clearly part of the pre-June 23, 1978, aspects of this case,not any "new relief." Indeed, as to the period after June 23, 1978, this Court has held that "the University is no longer concerned with the Maryland law of domicile, but rather with its own more limited use of that term." Memorandum Opinion of October 31, 1979, at p. 18. The success or failure of that argument has no bearing on the order proposed for the period before June 23, 1978.[2]

[2] To the extent Mr. Feldman means to argue that the University may still be permitted, *apart from the question of domicile*, to deny in-state status to the plaintiffs under the pre-June 23, 1978, policy on the ground of their G-4 status or tax exemption, that contention must fail. The Court's decision that domicile under Maryland law was the controlling concern of the University prior to June 23, 1978, precludes defendant from denying in-state status to class members on any ground other than non-domicile, and the revised proposed order, in paragraph 7, correctly reflects that decision.

For all of these reasons, the revised proposed order enclosed with this letter should be entered by the Court on the issues relating to the period prior to June 23, 1978.

Respectfully submitted,

Alfred L. Scanlan

PROPOSED ORDER

For the reasons stated in the Court's memorandum opinion filed on October 31, 1979, it is this day of , 1980, hereby ORDERED, ADJUDGED and DECREED that:

1. Prior to June 23, 1978, in-state eligibility at the University of Maryland under its "In-State Policy" hinged upon a determination of Maryland domicile according to state law principles; plaintiffs and the class they represent were entitled to the benefits of in-state status prior to June 23, 1978, upon a showing that they were, in fact, Maryland domiciliaries, as that term is generally defined by the laws of the State.

2. The University of Maryland's In-State Policy, as enforced prior to June 23, 1978, to flatly deny to all G-4 visa-holders the opportunity to prove that they were domiciled in Maryland according to state law principles, was unconstitutional as a violation of the Due Process Clause of the Fourteenth Amendment.

3. The Court's order of July 13, 1976, 420 F. Supp. 541, 565 (1976), is hereby reaffirmed insofar as it relates to the In-State Policy prior to June 23, 1978.

4. The class represented by the named plaintiffs for the purpose of their challenge to the In-State Policy prior to June 23, 1978, is redefined, pursuant to Fed. R. Civ. P. 23(c)(1), as the following subclass: All persons who, beginning July 13, 1976, and during any period of time thereafter up to June 23, 1978, have resided in Maryland

and attended the University of Maryland, and who held or were named within a visa under 8 U.S.C. § 1101(a)(15)(G)(iv) or were financially dependent upon a person holding or named within such a visa.

5. Defendant John S. Toll is hereby enjoined from enforcing the University of Maryland's "In-State Policy," as it was in effect prior to June 23, 1978, with respect to the named plaintiffs and the members of their class by denying them the opportunity to demonstrate that they or any of them were entitled to "in-state" status for purposes of tuition and charge differential determinations.

6. As to each member of the class whose status was determined by a G-4 visa for the Fall semester of 1976 or for any subsequent semester up to and including the Spring semester of 1978, and whose request for reclassification, if filed prior to the last day available for registration for the Fall 1976 semester (or, for any subsequently registering student, the last day available for registration for the first semester in which such student enrolled), would have been granted but for the stay order pending appeal granted on August 3, 1976, defendant John S. Toll shall refund the difference in tuition and other charges between the "out-of-state" charges assessed and actually paid and the "in-state" charges that would have been assessed, in the event the Court's Order of July 13, 1976, had been immediately effective, including interest at the legal rate.

7. For purposes of paragraph 6 of this order, the determination of which members of the subclass would have been granted reclassification to in-state status but for the stay pending appeal shall be based on the following determination of domicile: whether, for each term in which such student was enrolled at the University during the relevant period, such student (if financially independent) or the person or persons upon whom such student was financially dependent was domiciled in the State of Maryland according to state law principles or six consecutive months prior to the beginning of that semester.

8. In making the determinations of domicile required by paragraph 7 of this order, defendant Toll shall apply the same standards, and apply them in the same way, as he or his predecessor did in determining whether a citizen or permanent resident alien is domiciled in Maryland, and shall not determine that a person was a nondomiciliary of Maryland on the ground that he or she either held a G-4 visa or was exempt from state and local income taxation on a salary or wages from an international organization by virtue of an international agreement to which the United States is a party.

9. The Court reserves the question of court costs and attorneys' fees.

_____

United States District Judge

AFFIDAVIT OF WAYNE SIGLER
(Filed January 28, 1980)

STATE OF MARYLAND,
COUNTY OF PRINCE GEORGE'S, TO WIT:

I, WAYNE SIGLER, being duly sworn, depose and say as follows:

1. I am Director of Undergraduate Admissions for the University of Maryland, College Park. I have served continuously in this position since January, 1977.

2. In this supervisory capacity, I exercise overall administrative responsibilities relative to the admission of undergraduate students to the College Park campus of the University, including processing the admission of foreign students and administering the University's policy with respect to tuition and fee differentials charged in-state and out-of-state undergraduate students. In addition, at my request, statistics regarding foreign student population at the principal undergraduate campuses of the University of Maryland (College Park, Baltimore County, and Eastern Shore) have been compiled from the official records of the University of Maryland.

3. In the fall of 1978, these statistics reflect that 493 students with nonimmigrant visas registered as undergraduate students at the College Park, Baltimore County, and Eastern Shore campuses of the University of Maryland, while 997 immigrant students were registered. These students, by campus and visa category, are as follows:

	CAMPUS		
	Balto. Co.	*College Park*	*Eastern Shore*
A-Visa	—	52	—
F-Visa	30	201	35
G-IV Visa	—	68	—
J-Visa	2	5	—

Other non-immigrants	—	100	—
Immigrants/ Permanent Residents	167	830	—

4. In the fall of 1979, these statistics reflect that 554 students with nonimmigrant visas registered as undergraduate students at the College Park, Baltimore County and Eastern Shore campuses of the University of Maryland, while 1255 immigrant students were registered. These students by campus and visa category are as follows:

	CAMPUS		
	Balto. Co.	*College Park*	*Eastern Shore*
A-Visa	1	72	—
F-Visa	25	273	30
G-IV Visa	—	72	—
J-Visa	1	8	—
Other non-immigrants	—	72	—
Immigrants/ Permanent Residents	216	1034	5

5. Those students listed as immigrant/permanent resident aliens in paragraphs 3 and 4 above are not prevented from qualifying for in-state tuition and fee differentials and many of them are classified as in-state students. For example, for the fall of 1979, at least 985 immigrants/ permanent resident aliens at the College Park Campus received an in-state classification.

6. Because of my role in administering the University's in-state policy and my service on the Intercampus Review Committee which considers appeals for students seeking in-state classification, I am well acquainted with the features of the University's policy (which, insofar as it

denies in-state status to nonimmigrants, is identical to that of the overwhelming majority of other public colleges and universities in the United States) and also its administrative costs, in terms of staff time and expense.

7. Presently, 17 members of my staff devote a substantial portion of their time administering the in-state determination and appeals process, and handling the average of 700 petitions for in-state classification filed each year by undergraduates at the University's College Park Campus. Although it is difficult to calculate with precision the actual total annual cost of administering the in-state determination and appeals process for all campuses of the University, I estimate, based on the most recent data available that it may exceed $100,000 annually if staff time of the Admissions Office, Chancellor's Office, and the President's Office, and the Attorney General's Office are included, as well as costs for supplies and other overhead expenses, including pro-rata costs for buildings use and utilities. Of greater incalculable cost to the University is the loss of countless hours required to administer the in-state process by Admissions Office personnel who should be spending their time visiting high schools, responding to prospective students' inquiries, and recruiting the very best students to attend the University.

8. Presently, in-state classification hearings for non-immigrant aliens, where requested, are generally limited to the "objective" criterion of determining whether their non-immigrant status has been adjusted. However, based upon my more than eight years experience on the University admissions staff, I am convinced that measurably more staff time and expense would be involved if full-scale individualized hearings on purported domiciliary indicia were afforded non-immigrant aliens. Affording non-immigrant students full-scale hearings would, in my view, likely render the process more protracted, complicated, and consequently more administratively burdensome to the University.

I hearby affirm, attest, and confirm that I am over 21 years of age, competent to testify, and except as otherwise indicated herein, have personal knowledge of the foregoing statements.

WAYNE SIGLER

SUPPLEMENTAL COMPLAINT

(Filed February 4, 1980)

1. Plaintiffs incorporate by reference and reallege the allegations of paragraphs 1 through 30 of their Verified Complaint filed on May 27, 1975, and designate those paragraphs as Count I.

Count II

2. Plaintiff Rene Otero, Jr., is a native of Bolivia. He is the younger brother of plaintiff Juan Pablo Otero, is twenty-three years old, and has resided with his family in Maryland for fourteen years. He holds a G-4 visa. He is domiciled in the State of Maryland.

3. Rene Otero, Jr., is currently a full-time student at the University of Maryland. He has attended the University as a full-time student since the fall of 1976.

4. On June 23, 1978, the Board of Regents of the University of Maryland adopted "A Resolution Clarifying the Purposes, Meaning, and Application of the Policy of the University of Maryland for Determination of In-State Status for Admissions, Tuition, and Charge Differential Purposes, Insofar as It Denies In-State Status to Nonimmigrant Aliens." This Resolution purports to be a "reaffirmation" of the Board of Regents' in-state policy adopted on September 21, 1973. That policy, as applied under the Resolution subsequent to June 23, 1978, bars all nonimmigrant aliens, including the plaintiffs and the class whom they represent, from establishing in-state status at the University of Maryland, "regardless of whether or not

the policy approved by the Board of Regents on September 21, 1973, conforms with the generally or otherwise applicable definition of domicile under the Maryland common law."

5. The Resolution of June 23, 1978, however, effects no change in the standards governing determinations of in-state status of United States citizens or aliens holding immigrant visas, as those standards are described in paragraph 12 of plaintiffs' Verified Complaint.

6. In consequence of the Board of Regents' policy for the determination of in-state status, both as initially adopted on September 21, 1973, and as applied since June 23, 1978, plaintiff Rene Otero, Jr., has been denied in-state status, and thus has paid, and continues to pay, the charges applicable to out-of-state students at the University of Maryland. By so denying Rene Otero, Jr., in-state status, defendant has violated and is violating his rights under the federal statutes and the clauses of the United States Constitution set forth in paragraph 2 of plaintiffs' Verified Complaint, as well as the Supremacy Clause, Article VI, Clause 2, of the United States Constitution.

WHEREFORE plaintiffs pray that this Court, in addition to awarding the relief prayed for in the Verified Complaint filed on May 27, 1975:

(1) adjudge and declare that the actions of the defendant in denying to plaintiffs in-state status for admission, tuition, and charge-differential purposes on the basis of the University's September 21, 1973, policy as applied under the Board of Regents' June 23, 1978, Resolution are unlawful;

(2) enjoin the defendant from enforcing the University's September 21, 1973, policy as applied under the Board of Regents' June 23, 1978, Resolution by denying to any student in-state status either partially or wholly on the basis that such student or any parent or person on whom such student is financially dependent: (a) is the holder of a

G-4 visa, or (b) pays no Maryland state income tax on a salary or wages from an international organization under the provisions of an international treaty to which the United States is a party.

Dated: November 16, 1979

Signatures omitted

ANSWER TO SUPPLEMENTAL COMPLAINT

(Filed February 21, 1980)

Defendant, John S. Toll, President of the University of Maryland, by his attorneys, Stephen H. Sachs, Attorney General, David H. Feldman, Assistant Attorney General, and Robert A. Zarnoch, Assistant Attorney General, in answer to the Supplemental Complaint filed herein state:

1. In response to paragraph 1 of the Supplemental Complaint, Defendant incorporates by reference and realleges the defenses and allegations of paragraphs 1 through 30 of the Answer to Plaintiffs' Verified Complaint filed on June 25, 1975.

2. In light of this Court's order of February 4, 1980, denying the motion of Rene Otero, Jr., to intervene, Defendant feels that no response is necessary to paragraph 2 of the Supplemental Complaint, but to the extent an answer is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the Supplemental Complaint.

3. In light of this Court's order of February 4, 1980, denying the motion of Rene Otero, Jr. to intervene, Defendant feels that no response is necessary to paragraph 3 of the Supplemental Complaint, but to the extent an answer is required. Defendant admits the allegations contained in paragraph 3 of the Supplemental Complaint, except that Rene Otero, Jr. has been a full-time student at the University of Maryland since the fall of 1975.

4. Defendant admits the allegations contained in paragraph 4 of the Supplemental Complaint.

5. Defendant admits the allegations contained in paragraph 5 of the Supplemental Complaint.

6. In light of this Court's order of February 4, 1980, denying the motion of Rene Otero, Jr. to intervene, Defendant feels that no response is necessary to paragraph

6 of the Supplemental Complaint, but to the extent that an answer is required, Defendant admits the allegations contained in the first sentence of paragraph 6 but denies the allegations contained in the second sentence of paragraph 6 of the Supplemental Complaint.

WHEREFORE, Defendant respectfully prays that:

(1) The relief requested in the Verified Complaint and the Supplemental Complaint be denied.

(2) All cost of these proceedings be assessed against Plaintiffs.

Signatures omitted

In The United States District Court
for the District of Maryland

Civil Action No. M-75-691

Juan Carlos Moreno, et al.

vs.

John S. Toll,
President, University of Maryland

MEMORANDUM AND ORDER

(Filed April 11, 1980)

As stated in open court in a hearing held on March 27, 1980, the court finds it appropriate to reconsider its prior ruling (Paper 37) on the plaintiffs' motion to add a party plaintiff, Renee Otero, Jr. (Paper 29).

It is therefore ORDERED this 11th day of April, 1980, by the United States District Court for the District of Maryland, that the plaintiffs' motion for leave to add a party plaintiff is hereby GRANTED, and Renee Otero, Jr. is hereafter a party plaintiff in the present action.

JAMES R. MILLER, JR.,
United States District Judge.

LETTER TRANSMITTING PROPOSED ORDER

April 28, 1980

The Honorable James R. Miller, Jr.
United States District Judge
U.S. District Court for the
District of Maryland
U.S. Court House
101 W. Lombard Street
Baltimore, Maryland 21201

Re: Juan Carlos Moreno, *et al.* v. John S. Toll Civil Action No. M-75-691

Dear Judge Miller:

At the close of oral argument in this case on March 28, 1980, you stated that the parties and the Court probably would have one more session regarding the final order to be issued in this case. To that end, we have prepared a proposed order to implement Your Honor's memorandum opinions of October 31, 1979 and April 17, 1980. This proposed order takes the place of the order we submitted to Your Honor under cover of January 15, 1980 and the letter accompanying that order and explaining the provisions still applies to most of this order.

We await the Court's convenience in scheduling any conference that it may think is required concerning the order.

As indicated, a copy of this letter and proposed order have been sent to Mr. Feldman.

Sincerely yours,

ALFRED L. SCANLAN

PROPOSED ORDER

For the reasons stated in the Court's memorandum opinion of October 31, 1979, 480 F. Supp. 1116, and the

Court's memorandum opinion filed on April 17, 1980, it is this day of May, 1980, hereby ORDERED, ADJUDGED and DECREED that:

1. Prior to June 23, 1978, in-state eligibility at the University of Maryland under its In-State Policy hinged upon a determination of Maryland domicile according to state law principles; plaintiffs and the class they represent were entitled to the benefits of in-state status prior to June 23, 1978, upon a showing that they were, in fact, Maryland domiciliaries, as that term is generally defined by the law of the state.

2. The University of Maryland's In-State Policy, as enforced prior to June 23, 1978, to flatly deny to all G-4 visaholders the opportunity to prove that they were domiciled in Maryland according to state law principles, was unconstitutional as a violation of the Due Process Clause of the Fourteenth Amendment.

3. The Court's order of July 13, 1976, 420 F. Supp. 541, 565 (1976), is hereby reaffirmed insofar as it relates to the In-State Policy prior to June 23, 1978.

4. The University of Maryland's In-State Policy, as enforced since June 23, 1978, pursuant to the Board of Regents' "Clarifying Resolution" of June 23, 1978, to flatly deny to all G-4 visa-holders the opportunity to prove that they were domiciled in Maryland according to state law principles, has been and is now unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment and the Supremacy Clause of the U.S. Constitution.

5. The Court's order of July 13, 1976, 420 F. Supp. 541, 565 (1976), is hereby reaffirmed insofar as it relates to the In-State Policy as applied after June 23, 1978, except for the different grounds for the relief ordered that are set forth in the memorandum opinion of April 17, 1980, and paragraph 4 of this order.

6. The class represented by the named plaintiffs, which was initially defined at 420 F. Supp. 541, 564, and subdivided to include the following subclass by this Court's order of April 17, 1980:

> "All persons who, beginning July 13, 1976, and during any period of time thereafter up to June 23, 1978, resided in Maryland and attended the University of Maryland, and who held or were named within a visa under 8 U.S.C. § 1101(a)(15)(G)(iv) or were financially dependent upon a person holding or named within such a visa,"

is hereby further subdivided to include the following subclass within the originally defined class:

> "All persons who, beginning June 23, 1978, and during any period of time thereafter, have resided in Maryland and attended the University of Maryland, and who have held or have been named within a visa under 8 U.S.C. § 1101(a)(15)(G)(iv) or have been financially dependent upon a person holding or named within such a visa."

7. Defendant John S. Toll is hereby enjoined from enforcing the University of Maryland's In-State Policy, as it was in effect prior to June 23, 1978, or has been in effect subsequent to June 23, 1978, with respect to the named plaintiffs and the members of their class by denying them the opportunity to demonstrate that they or any of them were or are entitled to in-state status for purposes of tuition and charge differential determinations.

8. As to each member of the class whose status was determined by a G-4 visa for the Fall semester of 1976 or for any subsequent semester up to and including the date of this order, and whose request for reclassification, if filed prior to the last day available for registration for the Fall 1976 semester (or, for any subsequently registering student, the last day available for registration for the first semester in which such student enrolled), would have been granted but for the stay order pending appeal granted on

August 3, 1976, defendant John S. Toll shall refund the difference in tuition and other charges between the "out-of-state" charges assessed and actually paid and the "in-state" charges that would have been assessed, in the event the Court's Order of July 13, 1976, had been immediately effective, including interest at the legal rate.

9. For purposes of paragraph 8 of this order, the determination of which members of the subclass would have been granted reclassification to in-state status but for the stay pending appeal shall be based on the following determination of domicile: whether, for each term in which such student was enrolled at the University during the relevant period, such student (if financially independent) or the person or persons upon whom such student was financially dependent was domiciled in the State of Maryland according to state law principles for six consecutive months prior to the beginning of that semester.

10. In making the determinations of domicile required by paragraph 9 of this order, defendant Toll shall apply the same standards, and apply them in the same way, as he or his predecessor did in determining whether a citizen or permanent resident alien was domiciled in Maryland, and shall not determine that a person was a nondomiciliary of Maryland on the ground that he or she either held a G-4 visa or was exempt from state and local income taxation on a salary or wages from an international organization by virtue of an international agreement to which the United States is a party.

11. The Court reserves the question of court costs and attorneys' fees.

United States District Judge

LETTER TRANSMITTING PROPOSED ORDER

May 19, 1980

The Honorable James R. Miller, Jr.
United States District Judge
510 United States Courthouse
101 West Lombard Street
Baltimore, Maryland 21201

Re: *Moreno, et al. v. Toll,* Civil Action No. M-75-691

Dear Judge Miller:

Enclosed are the original and two copies of an order that the defendant urges is in appropriate form to give effect to this Court's opinions of October 31, 1979, and April 17, 1980.

For the reasons suggested in the letter to the Court written on the defendant's behalf, dated December 12, 1979, as amplified in this letter, the defendant believes that the most recently submitted order of the plaintiffs, sent April 28, 1980, violates the letter and the spirit of the Eleventh Amendment and should not be entered. The defendant's specific objections follow.

The defendant does not believe paragraph 1 of the plaintiffs' order is appropriate. As suggested in the defendant's December 12, 1979 letter, commenting on an earlier version of paragraph 1, the defendant believes it to be "gratuitous and unnecessary." In any event, the new paragraph 1 raises a number of problems. First, paragraph 1 is merely an out-of-context and thus misleading excerpt from page 20 of the Court's opinion of October 31, 1979; for example, the second clause suggests that the plaintiff "were entitled to the benefits" when the obvious thrust of the Court's opinion is that they "should have been." In addition, the language of this clause, by using the open-ended "prior to June 23, 1978," merely highlights the Eleventh Amendment problems the plaintiffs claim they seek to avoid. These two examples merely serve to

highlight the dangers of mixing opinion with order and counsel the deletion of this surplus paragraph.

The plaintiffs' paragraph 2, previously numbered paragraph 3 in their draft of November 26, 1979, remains unchanged, and should be rejected in favor of the defendant's alternative, for the reasons set forth in the first full paragraph of page two in the defendant's letter to the Court of December 12, 1979.

The defendant also objects to, and urges deletion of, the plaintiffs' new paragraph 3. It is a transparent effort to do an end-run around the proscription of the Eleventh Amendment to the United States Constitution. As discussed in the Memorandum of the Defendant, dated July 30, 1979, the Court's order of July 13, 1976, has been vacated and may not, at this late date, properly be resuscitated. It certainly was not and now never can be "finally affirmed on appeal," as required by the order of August 3, 1976.

The plaintiffs' new paragraph 4, which seeks to give effect to the Court's opinion of April 17, 1980, suffers the same problems as paragraph 2, and thus the defendant urges that his alternative language, included in the enclosed order, be accepted.

As paragraph 5 of the plaintiffs' order merely reiterates and enlarges on paragraph 3, it should be rejected on the same basis as that paragraph.

The plaintiffs have not sought to explain the further class subdivision included in paragraph 6 of their order and, absent explanation, the defendant believes this paragraph not to be appropriate. In any event, this is the sort of matter that the defendant urges would better be handled, if appropriate at all, by separate order.

The defendant also urges that paragraphs 7, 8, 9, and 10 are barred by the Eleventh Amendment to the United States Constitution. In this regard, the defendant's letter of December 29, 1979, adequately poses the problem in its comments on paragraphs 4, 5, and 6 of the earlier

proposal, and they need not be repeated here. Suffice it to say, by example, that paragraph 7 of the current order continues to suggest by its "prior to June 23, 1978," language, unlimited retroactive relief. Similarly, the defendant continues to except to the language found in paragraph 10 (paragraph 5 in the plaintiffs' proposed order of November 26, 1979) that purports to exclude any consideration of G-4 visa status or of nonpayment of state and local income taxes. Nothing in the Court's opinions suggests that retention of G-4 visa status or nonpayment of state and local income taxes could not be objective factors to be considered in making the subjective determination of domiciliary intent.

With the same caveat contained in his letter of December 12, 1979, the defendant accepts the language of paragraph 11 (paragraph 7 in the plaintiffs' draft of November 26, 1979), and it is included in his proposed order.

Because the plaintiffs have made no effort to distinguish their proposed order from the host of authority giving effect to the Eleventh Amendment's prohibition against retroactive monetary relief, the defendant has not undertaken to brief the obvious. However, if the plaintiffs do file a memorandum on this issue or if the Court has concerns in this respect, the defendant would like an opportunity to respond.

In summary, the defendant urges that the order enclosed with this letter — *not* the order contained in the plaintiffs' letter of April 28, 1980 — is appropriate to give effect to this Court's opinions of October 31, 1979, and April 17, 1980. For this reason, the defendant requests, subject to his obvious differences as to substance, that his proposed order be signed in the form he has submitted.

Thank you for the Court's consideration.

Respectfully yours,

DAVID H. FELDMAN,
Assistant Attorney General.

PROPOSED ORDER

For the reasons stated in the Court's memoranda filed on October 31, 1979, and April 17, 1980, it is this day of , 1980, by the United States District Court for the District of Maryland, hereby ORDERED:

1. That before June 23, 1978, the "In-State Policy" of the University of Maryland, which denied to G-4 aliens by use of an irrebutable presumption of non-domicile the opportunity to establish "in-state" status, was unconstitutional as it was in violation of the Due Process Clause of the Fourteenth Amendment;

2. That before, on, and after June 23, 1978, the "In-State Policy" of the University of Maryland, which denied to G-4 aliens the opportunity to establish "in-state" status, was and is unconstitutional as it was and is in violation of the Equal Protection Clause of the Fourteenth Amendment and the Supremacy Clause;

3. That an order granting prospective injunctive relief will be entered if the defendant does not act in accordance with the declarations set forth in this order after the expiration of the time for appeal or, if an appeal is filed, after this order is finally affirmed on appeal; and

4. That the Court reserves the question of court costs and attorneys' fees.

_____

United States District Judge

LETTER TRANSMITTING PROPOSED ORDER

May 28, 1980

The Honorable James R. Miller, Jr.
United States District Judge
United States District Court for
the District of Maryland
Room 510, U. S. Court House
101 W. Lombard Street
Baltimore, Maryland 21201

Re: *Juan Carlos Moreno et al. v. John S. Toll, Civil Action No. M-75-691*

Dear Judge Miller:

On April 28, 1980, we sent to you a proposed order in this case, intended to reflect your rulings of October 31, 1979, on the irrebuttable-presumption issue in this case, and of April 17, 1980, on the remaining issues. The proposed order was a substitute for the proposed order we had sent you on January 15, 1980 (on the first part of the case), but we said that the letter of January 15th still explained most of the provisions of the new proposed order.

Mr. Feldman, counsel for defendant, has replied to our proposed order on April 28th in a letter dated May 19, 1980, and has submitted defendant's latest proposed order. Indeed, he has done more. Though his letter of May 19th does not mention the fact, his proposed order incorporates a stay of any injunctive relief pending appeal. We had drafted each of our orders in the form of an order granting complete relief that would go into effect immediately, and did not discuss the form of any stay pending appeal. We did this simply because the matter of a stay pending appeal seemed to us a separate matter that should be addressed once the underlying order had been settled. In fact, we continue to believe that the matter of whether the order ultimately issued by this Court should be stayed pending appeal is best deferred. Mr. Feldman will have 10 days after the order is entered in which to move for stay

pending appeal, Rule 62(a), (c), Fed. R. Civ. P.; alternatively, he can file a motion in advance of entry of the order. There appears to be no reason for us to attempt to anticipate his arguments on a stay, particularly when the parties are in such severe disagreement over the underlying order, but we shall address, at the end of this letter, certain issues pertaining to a further stay. We turn first, however, to the question of the proper form of an order on the merits.

Defendant's critical objection to plaintiffs' proposed order is based on the Eleventh Amendment. Defendant objects to all the portions of plaintiffs' proposed order that require defendant to refund to members of plaintiffs' class the difference between out-of-state and in-state tuition from the Fall semester of 1976 to the date of the entry of the order under consideration. In short, defendant's position is that while *prospective* injunctive relief is appropriate (though he seeks to avoid the entry of that relief until all appeals are exhausted, see his proposed order, ¶ 3), he cannot, by reason of the Eleventh Amendment, be required to pay back any money unlawfully collected after the date of this Court's initial order of July 13, 1976, 420 F. Supp. 541. This position is absolutely indefensible, as we shall demonstrate below.[1]

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[1] Defendant's objections to paragraphs 1 through 5 of our proposed order seem to us largely misplaced. Apart from the Eleventh Amendment objection, discussed in the rest of this letter, there seems little difference between the parties. Mr. Feldman states that ¶ 1 "highlights" the Eleventh Amendment problem, while we believe it has little to do with the matter of monetary relief. This Court has held that the In-State Policy was unlawful before June 23, 1978, on irrebutable-presumption grounds; accordingly, plaintiffs and their class "were entitled" at that time to the benefits of in-state status, as the paragraph states.

Apart from that, we have no objection to ¶¶ 1 and 2 of defendant's proposed order being substituted for ¶¶ 2 and 4 of plaintiffs' proposed order of April 28th, and we attach a proposed order that makes that correction to our proposal.

This Court's opinion and order of July 13, 1976, 420 F. Supp. 541, declared that the University's "In-State Policy," was unconstitutional in its effect on G-4 visaholders, and enjoined the enforcement of that policy "with respect to the named plaintiffs and the members of their class by denying them the opportunity to demonstrate that they or any of them are entitled to 'in-state' status for purposes of tuition and charge differentials." 420 F. Supp. at 565. Accordingly, if this order had not been stayed pending appeal, from the Fall semester of 1976 to date, the members of the plaintiffs' class would have been treated on the same terms as citizens and resident aliens, and, if they could establish that they were domiciled in Maryland, would have paid the lower in-state tuition ever since.

On August 3, 1976, this Court stayed the effectiveness of the July 13th order. That stay order was granted after a motion by defendant, in which he represented specifically that "plaintiffs will not suffer substantial harm if a stay is granted," Motion to Stay Order Pending Appeal (July 31, 1976), at 1, and after an oral hearing on August 2, 1976, at which counsel for defendant made certain representations that are summarized in the stay order.

That stay order reads, in pertinent part,

> "[T]he Court having heard oral argument of counsel for the respective parties in open court on August 2, 1976, at which time it was represented by counsel for Defendant Elkins [Mr. Feldman] that were a stay granted (1) the University of Maryland, for the fall 1976 semester and any other semester that commences before the appellate process is concluded, as to each student whose status is currently determined by a G-4 visa and whose request for reclassification, if filed prior to the last day available for registration for the fall 1976 semester, would have been granted but for the stay, would refund the difference in tuition and other charges between the 'out-of-state' charges assessed and actually paid and the 'in-state' charges that would have been assessed, in the event the

Court's Order of July 13, 1976, were finally affirmed on appeal * * *;

"And the Court having determined from the foregoing pleadings and arguments that the prerequisites for the granting of a stay pending appeal, stated in *Long v. Robinson*, 432 F.2d 977 (4th Cir. 1970), have been satisfied;

"IT IS * * *

"ORDERED, That the Motion to Stay Order Pending Appeal be granted as prayed and that the effectiveness of paragraphs (5) and (6) of the Court's Order contained in its Opinion and Order filed July 13, 1976, be, and the same hereby is, STAYED."

The intent of the parties and of the Court is clear on the face of this order. While defendant took his appeal, the University would not have to pay back the tuition differentials that might prove to be owing to members of the plaintiff class; if, however, the appeal was not successful, defendant would have to make the plaintiffs whole, back through the Fall semester of 1976 (the first full semester after the prospective order of July 13, 1976). If that had not been the obvious intent of the stay order, it is unlikely in the extreme that this Court would have found that the prerequisites of *Long v. Robinson* were met. Nor could defendants have represented that "plaintiffs will not suffer substantial harm if a stay is granted."

As a result of defendant's appeal from the order of July 13, 1976, the Court of Appeals for the Fourth Circuit entered a per curiam order of affirmance, 566 F.2d 573 (Apr. 28, 1977); the Supreme Court certified a question of the Maryland law of domicile to the Maryland Court of Appeals, 435 U.S. 647 (Apr. 19, 1978); that court rejected defendant's contention on domicile as a matter of Maryland law, 284 Md. 425, 397 A.2d 1009 (Feb. 21, 1979); and the Supreme Court, in light of an intervening development that reflected a change in defendant's contentions, vacated the judgment of the Court of Appeals and directed that the case be remanded to this Court for reconsideration. 441

U.S. 458 (Apr. 30, 1979). In further proceedings in this Court, it has been determined that the 1976 order enjoining the application of the In-State policy against G-4 visaholders was entirely correct — for the same reason as that given in 1976 for the period up to June 23, 1978, and for different reasons (based on the Equal Protection and Supremacy Clauses), though ones that were fully briefed and argued throughout the case, for the entire period from July 13, 1976 to date.

In short, in not one court has defendant prevailed on the merits. It lost in 1976, and not one appellate court — including the Supreme Court — has said that the 1976 order was erroneous. It is incredible, under the circumstances, that defendant could advance the position that it should not now, and cannot ever be, ordered to pay the money it promised to refund, if necessary, in 1976. The upshot of defendant's argument is that he has won the entire case to date, since he claims he can never be required to pay back monies unlawfully collected after the date of the order of July 13, 1976 — an order never reversed by any court and now determined to have been correct.

Since we assume that defendant intends to appeal this Court's latest ruling, it is important to emphasize that the question is not whether defendant should be ordered to pay the money due since 1976 immediately, as opposed to after its intended appeal is exhausted. Defendant contends instead that he can *never* be ordered to pay refunds for the period 1976 to date. Its position is as follows:

> "[T]he Court's order of July 13, 1976, has been vacated and may not, at this late date, properly be resuscitated. It certainly was not and now nevercan be 'finally affirmed on appeal,' as required by the order of August 3, 1976." Letter of May 19, 1980, at 2.

As a matter of fact, this Court's order of July 13, 1976, has never been vacated. The order was stayed, by this Court, pending appeal. The Court of Appeals affirmed the

order. 566 F.2d 573. The Supreme Court, after determination of the certified question by the Maryland Court of Appeals, stated:

> "The Clarifying Resolution[of June 23, 1978] thus raises new issues of constitutional law which should be addressedin the first instance by the District Court. *We therefore vacate the judgment of the Court of Appeals* and remand to the District Court for further consideration in light of our opinion and judgment in *Elkins*, the opinion and judgment of the Maryland Court of Appeals in *Toll*, and the Board of Regents' clarifying resolution of June 23, 1978." 441 U.S. at 462 (emphasis added).

In short, it was the order of affirmance of the Court of Appeal that was vacated, not the order of this Court.

If the Supreme Court's order is interpreted as "vacating" the order of July 13, 1976, in the manner suggested by the defendant, then plaintiffs have suffered a grave miscarriage of justice. They sought the relief that was granted on July 13, 1976, on several grounds: (a) that the University's policy created an irrebuttable presumption in violation of the Due Process Clause, the ground accepted by this Court; (b) that the policy denied plaintiffs equal protection of the laws, a ground not ruled on by this Court in 1976, but approved in the memorandum of April 17, 1980; and (c) that the policy violated the Supremacy Clause, a ground also not ruled on by this Court in 1976, but approved in the memorandum of April 17, 1980. If the Supreme Court had intended to rule that the order of July 13, 1976, was improperly entered, it would have had to address the contentions that this Court had not ruled on. Those issues were fully briefed in the Supreme Court. Nevertheless, the Supreme Court did not say anything about them. We think it is obvious that the Supreme Court believed that the issue that defendant had presented to it — the irrebuttable-presumptions issue — might no longer be the dispositive ground of the order of July 13, 1976, given that defendant was arguing that the Clari-

fying Resolution of June 23, 1978, avoided the irrebuttable-presumption issue. Since that issue had not been addressed by the District Court, the Supreme Court remanded the case so it would be addressed. The case is thus in the same posture as if this court had agreed to entertain a timely Rule 60 motion for relief from its judgment.

In any event, we believe that defendant's position has already been rejected by this Court. In its principal memorandum on the irrebuttable presumption issue, Memorandum of Defendant dated July 30, 1979 (hereinafter "Def. Memo. (7/30/79)"), defendant argued at length that the Court was not free to "reembrace" the doctrine of irrebuttable presumptions, in part because "the effect of the Supreme Court's action in vacating the fourth Circuit judgment and remanding to this court is to vacate the July 13, 1976, judgment of this court." Def. Memo. (7/30/79) at 12-13. And in arguing that the June 23, 1978, Clarifying Resolution "did not retroactively impair a vested right to which the plaintiffs were entitled," defendant argued in a footnote:

> "The possibility of tuition refunds contained in the order of August 3, 1976, hinged, among other things, upon the order of July 13, 1976, being 'finally affirmed on appeal.' It is beyond argument that this condition was not fulfilled." Def. Memo. (7/30/79) at 15 n. 13.

Had this Court accepted defendant's arguments, a large portion of its Memorandum Opinion of October 31, 1979, 480 F. Supp. 1116, would have been entirely unnecessary. While that opinion declined to accept the applicability of the irrebuttable-presumption doctrine for the In-State Policy after June 23, 1978, slip op. at 20-21, 480 F. Supp. at 1125-26, it reaffirmed the illegality of the In-State Policy prior to June 23, 1978, on the basis of the irrebuttable-presumption doctrine. Slip op. at 13-20, 480 F. Supp. at 1122-25. Had the Court accepted defendant's

argument, there would have been no point on ruling on the Policy prior to June 23, 1978, for a prospective injunction could not have been entered in 1979 or 1980 relating to the period prior to June 23, 1978 (unless that injunction ordered defendant to pay back monies unlawfully collected during that period — a remedy defendant is saying is inappropriate). Questions relating to the period of time prior to June 23, 1978, still presented a live controversy solely because of the stay pending appeal and the conditions upon which it was entered. Dealing specifically with defendant's argument that the stay order had become irrelevant, the Court said:

> "The ruling by this court was filed on July 13, 1976, granting injunctive relief to the plaintiffs. That order was stayed, however, pending final outcome on appeal on condition that, should the plaintiffs ultimately prevail, the University would refund to them the difference between in-state and out-of-state charges paid. [Footnote omitted.]
>
> "The defendants maintain that the plaintiffs' rights have not been adversely affected by the University's change in position and that giving the 'clarifying' resolution retroactive effect will not impair the plaintiffs' rights. Defendants base this contention on their perception that the order staying this court's initial injunction order made the plaintiffs' eventual right to any monetary recovery contingent upon a final decision in their favor. Since no final ruling has been entered for the plaintiffs, *the defendants claim the plaintiffs have no right to any compensation* and will not be prejudiced if the University's regulation is given retroactive effect.
>
> "*The court is not persuaded by the defendants' argument on this point.* * * *" Slip op. at 18-19, 480 F. Supp. 1124-25 (emphasis added).

Thus this Court has squarely rejected defendant's contention that it cannot be ordered to pay the refunds agreed to in the stay order of August 3, 1976, and that ruling, besides being entirely correct, is the law of the case.

For all these reasons, there is no Eleventh Amendment problem in this case because of the conditions imposed on the stay order of August 3, 1976. Plaintiffs' proposed order properly directs defendant to begin processing members of plaintiffs' class and to make refunds to those members of the class who were domiciled at the relevant times.

Another matter raised by defendant Toll concerning the proposed order on the merits requires a response. He objects to ¶ 10 of plaintiffs' proposed order on the ground that it "purports to exclude any consideration of G-4 visa status or of nonpayment of state and local income taxes." Defendant argues that "[n]othing in the Court's opinions suggests that retention of G-4 visa status or of nonpayment of state and local income taxes could not be objective factors to be considered in making the subjective determination of domiciliary intent." Letter of May 19, 1980, at 2-3. A determination on "domicile" is typically made on the basis of "all the circumstances." To the extent that this is a test for citizens and resident aliens, plaintiffs do not object to the same test being applied to G-4 visaholders. This, indeed, is the point of the first clause of ¶ 10. The danger that we see, however, is that the decision-maker might let G-4 visa status or exemption from state and local income taxation under the treaties be determinative factors in the decision. This result, of course, would merely achieve by indirection what the court has ruled unlawful. Obviously the decision-maker can take into account that these class members are aliens who may have roots in other countries; indeed, the decision-maker will have to take into account some aspects of a G-4 visa to avoid placing undue weight on the fact that a G-4 visaholder has not sought to become a "resident alien." We believe that our proposed wording captures the intended meaning that holding a G-4 visa and being exempt from taxation under the treaties not be determinative factors in the determination of domicile.

* * * * * *

Having dealt with Mr. Feldman's objections to the proposed order on the merits, we feel it may be helpful at this time to say something about the separate matter that he raises: Whether this order of the Court should be stayed pending the appeal that we expect defendant will take.

Our position is that the stay pending appeal entered on August 3, 1976, expires with the entry of the Court's order that is now under consideration. The stay of August 3, 1976, was intended to remain in effect during the pendency of defendant's appeal, and it makes sense to construe it as remaining in effect during the pendency of any further proceedings that are directed as a result of that appeal — that is, during the proceedings before this Court on the remand ordered by the Supreme Court. In other words, our position is that the order of July 13, 1976, will be "finally affirmed on appeal" within the meaning of the stay order when this Court enters its new order. This Court has already concluded that the order of July 13, 1976, was proper and required by law, though in part for reasons different from those originally set forth. But that change of ground does not alter the fact that the Court made the determination that an injunction against the University's "In-State Policy" was proper in 1976 because the policy was unlawful and, upon consideration of the effect of the June 23, 1978, Clarifying Resolution (which offered additional justifications for the In-State Policy but did not modify it by its terms), has made the determination that the Policy was unlawful at all times after July 13, 1976. No further proceedings were directed by the Supreme Court. Thus, the result of defendant's appeal has been a determination that the original decision to enjoin the Policy was correct. Neither the Supreme Court nor the Court of Appeals retained jurisdiction of defendant's appeal. Accordingly, that appeal is now over, and defendant should be ordered to comply with the condition in the stay order.

If the Court issues such an order, defendant has indicated that he desires a stay pending appeal from the

new order. We would like the opportunity to respond fully to a motion for such a stay on the merits. We feel it is appropriate, however, to raise one of our concerns at this time, a concern that relates to the harm resulting to members of the plaintiff class from the passage of time. We do so without prejudice to further arguments that we may have relating to a stay pending appeal.

It is now four years from this Court's initial determination that the University was unlawfully denying G-4 visaholders, and students dependent on G-4 visaholders, the opportunity to show that they were domiciled in Maryland at the time that they attended school. The more time passes, the more of these students will graduate and perhaps move away. More important, the problems of proving domicile several years ago become enormous, since the issue is a subjective one. If the order proposed by plaintiffs goes into effect immediately, defendant will begin processing on the proper standard the long-outstanding requests for classification to in-state status. If it does not go into effect, that subjective determination will be delayed again, perhaps for several years. If a further stay pending appeal were to be granted in this case, plaintiffs would strenuously urge that, at the very least, defendant be ordered to make the determinations required under ¶¶ 9 and 10 of plaintiffs' proposed order, even if the money is not paid out pending further appeal. Any other provision would be severely and unnecessarily prejudicial to the members of plaintiffs' class.

If the Court rejects our position that its impending order will mean that the original order of August 3, 1976, then it follows that the appeal process must be deemed continuing: that is, that the stay order remains in effect pending defendant's intended appeal (or a determination not to appeal). In that event, plaintiffs wish to be deemed to have moved for modification of the stay order so that defendant may be required to start the determinations of domicile as outlined above. The unusual length of time that the Court's original order will have been on appeal

makes such a modification necessary because the premise of the August 3, 1976, stay order — no substantial harm to plaintiffs — no longer applies.

If Your Honor desires further comment on any of the issues addressed in this letter, we shall be happy to respond promptly.

Sincerely yours,

ALFRED L. SCANLAN

PROPOSED ORDER

For the reasons stated in the Court's memorandum opinion of October 31, 1979, 480 F. Supp. 1116, and the Court's memorandum opinion filed on April 17, 1980, it is this day of May, 1980, hereby ORDERED, ADJUDGED and DECREED that:

1. Prior to June 23, 1978, in-state eligibility at the University of Maryland under its In-State Policy hinged upon a determination of Maryland domicile according to state law principles; plaintiffs and the class they represent were entitled to the benefits of in-state status prior to June 23, 1978, upon a showing that they were, in fact, Maryland domiciliaries, as that term is generally defined by the laws of the State.

2. Before June 23, 1978, the "In-State Policy" of the University of Maryland, which denied to G-4 aliens by use of an irrebuttable presumption of non-domicile the opportunity to establish "in-state" status, was unconstitutional as it was in violation of the Due Process Clause of the Fourteenth Amendment.

3. Before, on, and after June 23, 1978, the "In-State Policy" of the University of Maryland, which denied to G-4 aliens the opportunity to establish "in-state" status, was and is unconstitutional as it was and is in violation of the

Equal Protection Clause of the Fourteenth Amendment and the Supremacy Clause.

4. The Court's order of July 13, 1976, 420 F. Supp. 541, 565 (1976), is hereby reaffirmed insofar as it relates to the In-State Policy prior to June 23, 1978.

5. The Court's order of July 13, 1976, 420 F. Supp. 541, 565 (1976), is hereby reaffirmed insofar as it relates to the In-State Policy as applied before and after June 23, 1978, except for the different grounds for the relief ordered that are set forth in the memorandum opinion of April 17, 1980, and paragraph 3 of this order.

6. The class represented by the named plaintiffs, which was initially defined at 420 F. Supp. 541, 564, and subdivided to include the following subclass by this Court's order of April 17, 1980:

> "All persons who, beginning July 13, 1976, and during any period of time thereafter up to June 23, 1978, resided in Maryland and attended the University of Maryland, and who held or were named within a visa under 8 U.S.C. § 1101(a)(15)(G)(iv) or were financially dependent upon a person holding or named within such a visa,"

is hereby further subdivided to include the following subclass within the originally defined class:

> "All persons who, beginning June 23, 1978, and during any period of time thereafter, have resided in Maryland and attended the University of Maryland, and who have held or have been named within a visa under 8 U.S.C. § 1101(a)(15)(G)(iv) or have been financially dependent upon a person holding or named within such a visa."

7. Defendant John S. Toll is hereby enjoined from enforcing the University of Maryland's In-State Policy, as it was in effect prior to June 23, 1978, or has been in effect subsequent to June 23, 1978, with respect to the named

plaintiffs and the members of their class by denying them the opportunity to demonstrate that they or any of them were or are entitled to in-state status for purposes of tuition and charge differential determinations.

8. As to each member of the class whose status was determined by a G-4 visa for the Fall semester of 1976 or for any subsequent semester up to and including the date of this order, and whose request for reclassification, if filed prior to the last day available for registration for the Fall 1976 semester (or, for any subsequently registering student, the last day available for registration for the first semester in which such student enrolled), would have been granted but for the stay order pending appeal granted on August 3, 1976, defendant John S. Toll shall refund the difference in tuition and other charges between the "out-of-state" charges assessed and actually paid and the "in-state" charges that would have been assessed, in the event the Court's Order of July 13, 1976, had been immediately effective, including interest at the legal rate.

9. For purposes of paragraph 8 of this order, the determination of which members of the subclass would have been granted reclassification to in-state status but for the stay pending appeal shall be based on the following determination of domicile: whether, for each term in which such student was enrolled at the University during the relevant period, such student (if financially independent) or the person or persons upon whom such student was financially dependent was domiciled in the State of Maryland according to state law principles for six consecutive months prior to the beginning of that semester.

10. In making the determinations of domicile required by paragraph 9 of this order, defendant Toll shall apply the same standards, and apply them in the same way, as he or his predecessor did in determining whether a citizen or permanent resident alien was domiciled in Maryland, and shall not determine that a person was a nondomiciliary of Maryland on the ground that he or she either held a

G-4 visa or was exempt from state and local income taxation on a salary or wages from an international organization by virtue of an international agreement to which the United States is a party.

11. The Court reserves the question of court costs and attorneys' fees.

_____

United States District Judge

LETTER TRASMITTING PROPOSED ORDER

May 28, 1980

Alfred L. Scanlan, Esq.
Shea & Gardner
1800 Massachusetts Ave., N.W.
Washington, D.C., 20036

David H. Feldman, Esq.
Assistant Attorney General
One South Calvert Building
Baltimore, Maryland 21202

Re: *Moreno v. Toll*
Civil Action No. M-75-691

Dear Counsel:

Enclosed herewith will be found a draft of a proposed Order which I am contemplating entering in this case. I wish to have a conference in connection with this Order on June 6, 1980, at 4:30 p.m. In the event that counsel are able to agree on an Order, please notify me in advance because, in that event, it will be unlikely that it would be necessary to have a conference.

Very truly yours.

JAMES R. MILLER, JR.,
United States District Judge.

PROPOSED ORDER

For the reasons stated in the Court's Memorandum Opinion of October 31, 1979, 480 F. Supp. 1116 (D. Md. 1979), and in the court's Memorandum Opinion filed on April 17, 1980, it is this day of May, 1980, hereby ORDERED, ADJUDGED AND DECREED as follows:

1. That the University of maryland's "In-State Policy," as enforced prior to June 23, 1978, which denied G-4 aliens

the opportunity to establish "In-State" status through the use of an irrebuttable presumption of non-domicile, was unconstitutional as it was in violation of the Due Process Clause of the Fourteenth Amendment;

2. That the University of Maryland's "In-State Policy," as enforced on, before, and after June 23, 1978, which denies G-4 aliens the opportunity to estblish "In-State" status, is unconstitutional as it is in violation of the Equal Protection Clause of the Fourteenth Amendment and the Supremacy Clause;

3. That the court's Order of July 13, 1976, 420 F. Supp 541, 565 (D. Md. 1976), is hereby REAFFIRMED insofar as it relates to the "In-State Policy" prior to June 23, 1978:

4. The court's Order of July 13, 1976, 420 F. Supp. 541, 565 (D. Md. 1976), is hereby REAFFIRMED insofar as it relates to the "In-State Policy," as applied after June 23, 1978, except for the different grounds for the relief ordered that are set forth in the Memorandum Opiniono f April 17, 1980, and Paragraph 2 of this Order.

5. Defendant John S. Toll is hereby enjoined from enforcing the University of Maryland's "In-State Policy" as it was in effect prior to June 23, 1978, or as it has been in effect subsequent to June 23, 1978, with respect to the named plaintiffs and the members of their class by denying them the opportunity to demonstrate that they or any of them were or are entitled to "In-State" status for purposes of tuition and charged differential determinations:

6. That as to the plaintiff subclass, as defined by Order of this court, dated April 17, 1980,[1] the defendant shall

[1] The plaintiff subclass was defined as follows:
"All persons who, beginning July 13, 1976, and during any period of time thereafter up to June 23, 1978, resided in Maryland and attended the University of Maryland, and who held or were named within a visa under 8 U.S.C. § 1101(a)(15)(G)(iv) or financially dependent upon a person holding or named within such a visa."

refund the difference, plus interest at the legal rate, between (1) "out of state" charges assessed to and paid by or on behalf of the members of the said subclass and (2) "In-State" charges that would have been assessed to and paid by or on behalf of members of the plaintiff subclass for the fall semester of 1976 or for any subsequent semester, and courses taken, prior to June 23, 1978, which said other charges or assessments would have been made pursuant to this court's Order of July 13, 1976, but for the stay of that Order which was granted pending appeal (*see* Order dated August 3, 1976);

7. For purposes of paragraph numbered 6 of this Order, the determination of which members of the subclass would have been granted reclassification to "In-State" status but for the stay pending appeal shall be based on the following determination of domicile: Whether, for each term in which such student was enrolled at the University during the relevant period, such student (if financially independent) or the person or persons upon whom such student was financially dependent was domiciled in the State of Maryland according to state law principles for six consecutive months prior to the beginning of that semester;

8. In making the determinations of domicile required by Paragraph 7 of this Order, defendant Toll shall apply the same standards, and apply them in the same way, as he or his predecessor did in determining whether a citizen or permanent resident alien was domiciled in Maryland, and shall not determine that a person was a nondomiciliary of Maryland solely on the ground that he or she either held a G-4 visa or was exempt from state and local income taxation on a salary or wages from an international organization by virtue of an international agreement to which the United States is a party;

9. The court reserves the question of court costs and attorneys' fees.

JAMES R. MILLER, JR.,
United States District Judge.

NOTICE OF APPEAL

(Filed May 30, 1980)

Notice is hereby given that John S. Toll, President, University of Maryland, the defendant above named, pursuant to 28 U.S.C. § 1292(a)(1), hereby appeals to the United States Court of Appeals for the Fourth Circuit from the order granting an injunction entered in this action on the 30th day of May, 1980.

Dated: May 30, 1980

Signatures omitted

AMENDED NOTICE OF APPEAL

(Filed June 27, 1980)

Notice is hereby given that:

1. John S. Toll, President, University of Maryland, a defendant above named, pursuant to 28 U.S.C. § 1292(a)(1), hereby appeals to the United States Court of Appeals for the Fourth Circuit from the order granting an injunction entered in this action on the 30th day of May, 1980;

2. The University of Maryland and John S. Toll, President, University of Maryland, the defendants above named, pursuant to 28 U.S.C. § 1291, hereby appeal to the United States Court of Appeals for the Fourth Circuit from the judgment entered in this action on the 30th day of May, 1980; and

3. John S. Toll, President, University of Maryland, a defendant above named, pursuant to 28 U.S.C. § 1291, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the amended judgment entered in this action on June 24, 1980.

Attached to this amended notice of appeal are copies of all of the correspondence between counsel and the court that relates to the form and content of the order granting an injunction entered in this action on the 30th day of May, 1980, which implements the court's memorandum opinions of October 31, 1979, and April 17, 1980.

Dated: June 27, 1980.

Signatures omitted